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No. ____

In The
Supreme Court of the United States

BRAD ROBERTS and STEVE PARKS,
Petitioners,

v.

RAYMOND TORRES and
MARIA ELVA AMADOR TORRES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hunter v. Bryant*, 502 U.S. 224 (1991) this Court held the "reasonable jury" standard traditionally applicable in a Rule 56, motion for summary judgment had no bearing on a qualified immunity determination because "it routinely placed qualified immunity in the hands of the jury" and with qualified immunity "the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable interpretation of the events could be constructed five years after the fact." *Id.* at 227-228. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation . . ." *Saucier v. Katz*, 533 U.S. 194, 202 (2001), rev'd in part *Pearson v. Callahan*, ___ S. Ct. __, 2009 U.S. LEXIS 591, 2009 WL 128768 (U.S. 2009).

When qualified immunity is asserted in a Rule 50 motion for judgment as a matter of law, does the "reasonable jury" standard called for by Rule 50 trump the legal inquiry called for by qualified immunity?

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CITATIONS FOR OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 540 F.3d 1031 (9th Cir. 2008), and is reprinted at Appendix, 1a – 31a. The decision of the district court granting the Petitioners' motion for judgment as a matter of law on the basis of qualified immunity was not reported, and is reprinted at Appendix, 32a – 41a.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit Court of Appeals filed its opinion on November 13, 2008. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The underlying action was brought by the Respondents pursuant to 42 U.S.C. § 1983, which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress ...

The Respondents allege that the Petitioners violated their civil rights by arresting respondent Raymond Torres without probable cause in violation of the Fourth Amendment to the United States Constitution. The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

1. Torres Filed A 42 U.S.C. § 1983 Suit Claiming Los Angeles Police Department Detectives Arrested Him Without Probable Cause In Violation of The Fourth Amendment.

Los Angeles Police Department Detectives Brad Roberts, Steve Parks and Foster Rains arrested Raymond Torres, without a warrant, based on his involvement in a gang-related shooting in Los Angeles. The Los Angeles County District Attorney filed murder and attempted murder charges against Torres, but then dismissed the charges after Torres spent 162 days in custody.

Approximately three months after the charges were dismissed, Torres and his mother, Maria Elva Amador-Torres, filed a 42 U.S.C. § 1983 complaint against the

City of Los Angeles, and Los Angeles Police Department Detectives Roberts, Park, Rains, and Jennifer Hickman, alleging that he was arrested without probable cause in violation of the Fourth Amendment.

Summary judgment was granted for the City on the claims brought pursuant to *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978) and the remaining individual capacity claims against the four detectives proceeded to jury trial.[1]

2. The Trial Evidence.

Detectives Roberts, Hickman, Parks, and Rains investigated a gang shooting that left one person dead and one wounded. On September 23, 2004, they arrested Torres without a warrant as the third suspect involved in the shooting. (Excerpts of Record [ER] 119.) Probable cause was based on the following facts that were undisputedly in the officers' possession at the time of the arrest:

On August 11, 2004, Carlos Guevara was shot in the head in a car-to-car gang shooting and died. (ER 231.) Jackie S., an eyewitness to the shooting, contacted the detectives, described the suspect vehicle as a silver Honda, and provided a partial license plate number. (Supplemental Excerpts of Record [SER] 25-A.) The detectives eventually traced the vehicle to Diana H.

---

[1] Torres did not challenge the grant of summary judgment for the City.

On August 25, 2004, the detectives interviewed Diana H. who said the Honda belonged to her mother. At the time of the shooting, her boyfriend, Josue "Johnny" Santillan was driving the car, she was the right-front passenger, and two of Santillan's friends were in the backseat. (SER 10.) Diana said that all three males belonged to the Canoga Park Alabama gang. (SER 10-11.) She said that they had been driving around for a couple of hours, when Santillan drove to Reseda Park, a hangout for the Reseda gang. (SER 11-12.)

Reseda gang members were at the park. Santillan pulled up to them and the two backseat passengers began "flashing gang signs" and challenging the Reseda gang members. (SER 13.) Santillan sped away when the Reseda gang members jumped into their car gave chase. The Reseda gang members pulled alongside Santillan and the right, rear passenger pulled out a gun and started shooting at the Reseda gang members. (SER 10-13.)

Diana positively identified her boyfriend, Santillan, as the driver and positively identified Joel Castaneda as the shooter. (SER 7; SER 14.) Diana described the third suspect as a male, Hispanic, 15 to 16 years old, very overweight or obese, and dark skinned. (ER 146-147.) The detectives arrested Santillan and Castaneda, but the third suspect remained at-large until September 23, 2004.

That day, Officer Steinberg, a school police officer at Santillan's high school, told the detectives that a student named Raymond Torres matched the description of the outstanding suspect—he was 15 to

16 years old, Hispanic, and was very overweight. (ER 112-114.)

Officer Steinberg also told the detectives that Torres had undergone a "drastic" change in his appearance over the summer and "he [was] dressing down as a gangster, shaving his head, which wasn't shaved before." (SER 3.) Officer Steinberg said that Torres and Santillan were friends and frequently ate lunch together. Steinberg also said that they hung out with Canoga Park Alabama gang members. (SER 3; SER 26.)

There was conflicting testimony at trial as to whether Steinberg also told one of the detectives that Torres had recently been "jumped" in the CPA gang.

At the detectives' request, school officials took a photograph of Torres and provided it, along with Torres' school photograph from the previous year. The photographs confirmed Steinberg's claim that Torres had undergone a drastic change in his appearance, shaving his head in the style of a gangster.

School officials had previously provided the detectives with a group photograph depicting driver Santillan, and five other males. In it, Santillan and one of the other males were clearly flashing Canoga Park Alabama gang signs. (SER 28.) After revisiting that photo on September 23, 2004, the detectives realized that Torres was also in it, standing next to Santillan. (SER 28.) Thus, the group photograph corroborated Steinberg's representation that Torres and Santillan were friends and that they both associated with CPA gang members.

Conflicting trial testimony was presented regarding whether in the photo; Torres was making a gang sign with his left hand. His right hand was not visible, only the upper portion of his left hand was. In both Detective Roberts' and Detective Rains' opinion, Torres was forming the letter "C" with his left hand—a sign for the CPA gang. (ER 154, 173.) Torres' expert disagreed.

Detective Hickman assembled a six-pack photo array, placing the recent photograph of Torres in the sixth position. Detectives Roberts, Park, and Rains went to Diana's home to see if she could identify the third suspect from the photo array. Detective Rains waited outside in his car while Detective Roberts and Park showed the six-pack to Diana. Diana appeared to focus on one photo in particular and when the detective asked her whom she was staring at, she said "picture number 6." (SER 18-19.) The detective asked Diana to write her identification on a copy of the photographic array. (SER 21.) Diana circled Torres' photo and wrote, "I circled the person in No. 6 because he looks more likely [sic] to the other guy in the car." (ER 16; ER 229.)

When the detectives asked Diana why she wrote that the person in position six looked "more like" the suspect, Diana explained: "[T]he reason why was because I don't know that name of the guy and I couldn't blame him if I didn't know. That's what I said." (SER 22.) At trial, it was disputed whether Diana's identification of Torres was a positive or tentative identification. When Torres cross-examined her, she explained: "Like I said, I never said he was and I never said he wasn't. I said he looks more like the other guy, but I said because he was chunky, dark-

skinned, the eyes were more like the guy, but that's the only reason." (SER 25.)

Detectives Roberts and Park rejoined Detective Rains in the car. They told Rains that Diana had identified Torres as the third suspect, but did not provide him with the details, or show him what Diana had written on the six-pack. Thereafter, Rains, Roberts, and Park went to Torres' home and arrested him outside of his house, in his mother's presence, without incident.

3. The District Court Ruled The Detectives Were Entitled To Qualified Immunity And Granted Their Motion For Judgment As A Matter Of Law.

After the close of evidence, pursuant to Federal Rule of Civil Procedure 50, the detectives moved for judgment as a matter of law, asserting qualified immunity. Conducting the two-step qualified immunity inquiry set forth in *Saucier v. Katz*, 533 U.S. 194, the district court ruled that after viewing the facts in the light most favorable to Torres and resolving any factual disputes in his favor, there was probable cause to arrest him as a matter of law and the detectives had therefore not violated his rights under the Fourth Amendment. (Appendix, 36a – 38a.)

Alternatively, the district court ruled that even if a constitutional violation could be made out, the detectives were entitled to qualified immunity "because they were reasonable in coming to the same

conclusion as the Court regarding the existence of probable cause." (Appendix, 39a – 40a.)

Torres timely appealed.

4. Proceedings In The Ninth Circuit

In a unanimous published opinion, the Ninth Circuit reversed judgment for Detectives Roberts and Parks, leaving both steps of the qualified immunity inquiry for the jury to resolve at trial.[2] With respect to the first step, the Court held "reasonable minds could disagree about the existence of probable cause." (Appendix, 20a.) Viewing the facts in the light most favorable to Torres and resolving the arguably disputed facts in his favor, the Court concluded that:

> "[B]ased on the information in the detectives' possession at the time of the arrest, *a reasonable jury could* have found that the detectives lacked probable cause to believe that Torres had been the third male passenger in the car and had acted in concert with the shooter

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[2] The Court of Appeals affirmed judgment for Detective Hickman, ruling that although she was involved in the investigation, there was no evidence that she directed or participated in the arrest, or acted in a supervisory capacity over Rains, Roberts, or Park, the detectives that arrested Torres. (Appendix, 12a – 13a.)

The Court also affirmed judgment for Detective Rains ruling "as a matter of law" Detective Rains "reasonably relied on the (allegedly false) statement by Detective Roberts that Diana had identified Torres." Thus, Detective Rains was entitled to qualified immunity because "a reasonable officer in Rains' position would have believed he had probable cause to arrest Torres." (Appendix, 25a.)

> with conscious disregard for human life." (Appendix, 16a-17a, emphasis added).

As for the second step, whether the constitutional right was clearly established, the Court held:

> "[T]here was enough evidence for a *reasonable jury* to conclude that reasonable police officers would not have acted as [Detectives Roberts and Park] did in arresting [*Torres*]. (Citation.) We therefore conclude that Detectives Roberts and Park were not entitled to qualified immunity as matter of law." (Appendix, 25a, emphasis added).

Detectives Roberts and Park petitioned for panel rehearing and rehearing en banc on the grounds that by measuring both prongs of qualified immunity against a reasonable jury standard, the court failed to determine either prong as mandated by *Saucier v. Katz*, 533 U.S. 194, and erroneously shifted the qualified immunity determination to the jury. The court denied the petition, withdrew its original opinion, and filed a new published opinion that made no substantive change. (Appendix, 2a -3a.)

REASONS FOR GRANTING CERTIORARI

In *Hunter v. Bryant*, 502 U.S. 224 this Court rejected the Ninth Circuit's approach to a qualified immunity determination that allowed the jury to decide qualified immunity unless there was only one conclusion a rational jury could reach. Qualified immunity requires the court, not the jury, to determine whether officers acted reasonably under settled law in the circumstances, not whether another

reasonable or more reasonable interpretation of the events could be constructed after the fact. *Id.* at 227-228.

In this case, the Ninth Circuit published an opinion that directly conflicts with *Hunter v. Bryant* — denying petitioners qualified immunity because a reasonable jury could conclude that reasonable police officers could have believed probable cause to arrest Torres was lacking. The Ninth Circuit noted that unlike *Hunter,* where qualified immunity was raised in a motion for summary judgment, petitioners asserted qualified immunity in a Rule 50 motion after the completion of trial, but before a jury verdict. (Appendix, 21a.) Reviving the "reasonable jury" approach that was rejected in *Hunter,* the Ninth Circuit held "there was enough evidence for a reasonable jury to conclude that reasonable officers would not have acted as Detectives Roberts and Park did in arresting Torres. We therefore conclude that Detectives Roberts and Park were not entitled to qualified immunity as a matter of law." (Appendix, 25a, internal quotations and citation omitted.)

Review is need to determine whether when the vehicle for asserting qualified immunity is a Rule 50 motion, the reasonable jury standard set forth in that rule overrides the clear holding in *Hunter v. Bryant*.

LEGAL ARGUMENT

1. The Ninth Circuit's application of a "reasonable jury" standard to petitioners' assertion of qualified immunity conflicts with Supreme Court authority, erroneously shifts the issue to the jury, defeats the purpose of qualified immunity, and creates conflict within the Ninth Circuit and with other Circuit Courts of Appeal.

When *Torres* issued, the court was required to follow the two-step procedure qualified immunity procedure mandated in *Saucier v. Katz*, 533 U.S. 194. Although the Ninth Circuit recited *Saucier's* two-step inquiry (Appendix, 21a), it completely sidestepped its obligation to resolve either question.

Rather than conducting *Saucier's* straight-forward qualified immunity test, the Ninth Circuit incorporated Federal Rule of Civil Procedure, Rule 50's reasonable jury standard, stating "[t]he court must deny the motion for judgment as a matter of law if *reasonable jurors could believe* that Defendants violated Torres' constitutional right, and the right at issue was clearly established." (Appendix, 21a, emphasis added.) Thereafter, the Ninth Circuit denied qualified immunity concluding "a reasonable jury could find that Defendants violated Torres' right to be free from arrest without probable cause," (Appendix, 24a) and "there was enough evidence for a reasonable jury to conclude that reasonable officer would not have acted as [Detectives Roberts and Park] did in arresting [Torres]." (Appendix, 25a.)

Petitioners recognize that in light of *Pearson v. Callahan*, ___ S. Ct. ___, it is no longer mandatory for the court to "decide whether the facts plaintiff has alleged (see Fed. Rule Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of constitutional right" and that this case could arguably fall within the category of cases where in its discretion, a court might choose to avoid answering the constitutional question. Review is nevertheless necessary because by viewing the second inquiry—the clearly established prong—through the prism of a reasonable jury, the Ninth Circuit erroneously rendered qualified immunity an issue for jury resolution, thereby defeating the purpose of the qualified immunity doctrine and clashing with well-established authority from this Court.

A. *Torres'* incorporation of the "reasonable jury" standard conflicts with *Hunter v. Bryant*.

Almost two decades ago, in *Hunter v. Bryant*, 502 U.S. 224, this Court clearly and unequivocally rejected the Ninth Circuit's application of the traditional "reasonable jury" standard to a qualified immunity determination:

> "The Court of Appeals' confusion is evident from its statement that 'whether a reasonable officer could have believed he had probable cause is a question of fact for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' [Citation.] This statement is wrong for two reasons. First, it routinely places the question

> of immunity in the hands of the jury. Immunity should ordinarily be decided by the court long before trial. [Citation.] Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable interpretation of the events could be constructed five years after the fact." *Id.* at 227-228.

In *Torres,* the Ninth Circuit concluded that *Hunter* did not control because *Torres,* unlike *Hunter,* involved an appeal from the grant of a Rule 50(a) motion made after the completion of trial, but before a jury verdict. (Appendix, 21a.)

> Plaintiffs here appeal the grant of a Rule 50(a) motion made after the completion of trial but before a jury verdict. While the Supreme Court has encouraged resolution of the qualified immunity issue early on in the lawsuit, such as at the summary judgment stage, [citation], Defendants chose not to move for summary judgment on qualified immunity grounds, acknowledging that "triable issues of material fact exist regarding Plaintiff's arrest." Thus, the case proceeded to trial before a jury. However, the same issues of material fact also prevent the court from granting the officers' motion for judgment as a matter of law. See e.g. *Grant,* 315 F.3d at 1090 (denying officers' motion for judgment as a matter of law on qualified immunity because "viewed in the light most favorable to the non-moving party, there was enough evidence for a reasonable jury to conclude that reasonable officers would not

> have acted as [the defendants] did in arresting [the plaintiff]."); . . .

(Appendix, 21a - 22a.)

Then, even though in the court's own words, "reasonable minds could disagree about the existence of probable cause" (Appendix, 20a), the court resurrected the very test long ago rejected in *Hunter,* denying qualified immunity because "'there was enough evidence for a reasonable jury to conclude that reasonable police officers would not have acted as [Detectives Roberts and Park] did in arresting [Torres].' *Grant v. City of Long Beach,* 315 F.3d 1081 (9th Cir. 2003). We therefore conclude that Detectives Roberts and Park were not entitled to qualified immunity as a matter of law." (Appendix, 25a.) Thus, the opinion erroneously resorts to the reasonable jury standard, a standard this Court rejected in *Hunter.*

That petitioners opted not to assert qualified immunity at the summary judgment stage, acknowledging that triable issues of material fact existed regarding the arrest, did not preclude them from asserting qualified immunity at the Rule 50 stage. The state of the evidence before trial was not necessarily the same as the evidence that was ultimately produced at trial. And in this case, the evidence produced at trial did not present material issues of disputed fact precluding qualified immunity. The facts the Ninth Circuit identified as disputed (did Diana positively identify Torres; did the school police officer say Torres had recently been "jumped" into a gang; and was Torres "flashing gang signs" in the group photograph) were not material to qualified

immunity, because resolving them in Torres' favor, petitioners were still entitled to qualified immunity.

Rather, the Ninth Circuit once again confused disputed material facts that must be resolved before the court can make the qualified immunity determination with disputes over the reasonable inferences that a jury could draw from the undisputed facts. *Hunter* makes clear that whether there is another reasonable, or more reasonable interpretation of the events that could be constructed in hindsight is irrelevant to a qualified immunity determination.

The fact that Rule 50 rather than Rule 56 was the vehicle for petitioners' assertion of qualified immunity, does not justify the Ninth Circuit's end-run around *Hunter*. Both summary judgment motions pursuant to Federal Rule of Civil Procedure 56 and motions for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 are traditionally judged against the backdrop of whether a "reasonable jury" could find for the non-moving party on the basis of the evidence.[3]

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[3] "Summary judgment is appropriate when the court can conclude that *no reasonable juror* could find for the non-moving party on the basis of the evidence presented in the motion and response." *Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574 (1986)*(italics added);* and "If a party has been fully heard on an issue during a jury trial and the court finds that *a reasonable jury* would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." *F.R.C.P. 50, subd. (a)(1)*(Italics added.)

But as this Court has repeatedly recognized, the court's task is different where qualified immunity is at stake. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation . . ." (*Saucier*, 533 U.S. at 202) and no opinion of this Court has ever called upon the court to view that inquiry through the lens of a reasonable jury.

To the contrary, this Court has made it quite clear that "if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335 (1986). Review is needed to clarify that even where qualified immunity is asserted in a Rule 50 motion for judgment as a matter of law, rather than in a motion for summary judgment, *Hunter* controls and the reasonable jury standard does not trump the straightforward "clearly established" inquiry.

B. Application of the reasonable jury standard defeats the very purpose of qualified immunity.

As reiterated in *Pearson v. Callahan*,

> The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Qualified immunity balances two important interests -- the need to

> hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (KENNEDY, J., dissenting) (citing *Butz v. Economou*, 438 U.S. 478, 507, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978) (noting that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law")). *Id. at* ___.

The inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (internal quotation marks omitted); see *Hope v. Pelzer*, 536 U.S. 730, 739, (2002) ("[Q]ualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." (Internal quotation marks omitted)).

This reasonable jury standard assigns the qualified immunity task to jurors who are unable to assess whether "in light of the pre-existing law the unlawfulness [is] apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Short of an extreme circumstance where the unlawfulness of the officer's conduct would be readily apparent even to someone not versed in the intricacies of constitutional law, qualified immunity would be converted into "a rule of

virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* at 639. If qualified immunity was denied every time a reasonable jury "could" come up with "another reasonable, or more reasonable" interpretation of the events, qualified immunity would be rendered virtually meaningless. Review is thus necessary to prevent erosion of qualified immunity protection in the Ninth Circuit.

C. *Torres* conflicts with authority within the Ninth Circuit.

In *Act Up! / Portland v. Bagley*, 988 F.2d 868, 872-873 (9th Cir. 1993), the Ninth Circuit recognized that *Hunter* rejected the approach in "[a] line of cases decided by this Court hold[ing] that the question of whether a reasonable police officer could have believed probable cause existed goes to the jury unless there is only one conclusion a rational jury could reach. [Citations.]" "We interpret *Hunter* to hold that the question of whether a reasonable police officer could have believed probable cause (or reasonable suspicion) existed to justify a search or an arrest is "an essentially legal question," [citation] that should be determined by the district court at the earliest possible point in the litigation." *Act Up!*, 988 F.2d at 873.

Ignoring its own precedent in *Act Up!*, *Torres* holds that whenever there is more than one conclusion a rational jury could reach regarding whether a reasonable police officer could have believed there was probable cause to arrest, qualified immunity must be resolved by the jury.

Thus, *Torres* is at odds with *Act Up!* and review is needed to resolve this conflict.[4]

D. Torres creates a conflict between the Circuits.

Most circuit courts agree that qualified immunity is never a jury question.

- **First Circuit** *Rodriguez-Marin v. Rivera-Gonzalez*, 438 F.3d 72, 83 (1st Cir. 2006) ("While preliminary factual questions regarding qualified immunity are sent to the jury, the legal question of the availability of qualified immunity is ultimately committed to the court's judgment.") (internal quotation marks omitted);

- **Fourth Circuit** *Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir. 2005) ("The issue having now come before us, we hold that the legal question of a defendant's entitlement to qualified immunity under a particular set of facts should be decided by the court, not by the jury.");

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[4] In *Grant v. City of Long Beach*, 315 F.3d 1081, an opinion the court heavily relied on in *Torres*, the Ninth Circuit similarly blurred the distinction between disputed material facts that would preclude qualified immunity and disputes over the inferences properly drawn from undisputed historical facts, treating these two distinct concepts as one. Committing the same error as the Ninth Circuit does in *Torres*, *Grant* characterized the issue of whether a reasonable police officer would have believed the arrest was lawful as a "disputed fact" for the jury to resolve: "A material issue of fact existed as to whether a reasonable officer would arrive at the same conclusion." *Id.* at 1090. Thus, *Grant v. City of Long Beach* also conflicts with *Act Up! / Portland v. Bagley*.

- **Seventh Circuit** *Ricardo v. Rausch*, 375 F.3d 521, 526 (7th Cir. 2004) ("Immunity, however, is a matter of law for the court, to be decided without deference to the jury's resolution-and preferably before the case goes to the jury.");

- **11th Circuit** *Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002) ("When the case goes to trial, the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense, but the jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty.").

However, in *Parsons v. City of Pontiac*, 533 F.3d 492 (6th Cir. 2008), the Sixth Circuit denied the officers' request for qualified immunity because "viewing the evidence in the light most favorable to [plaintiff], a jury could find that [the officers'] actions were not objectively reasonable." *Id.* at 504. "The problem is not that they ignored exculpatory evidence in arresting a suspect . . . but that a genuine issue of material fact exists as to whether they possessed sufficient inculpatory evidence to reasonably believe that [the plaintiff] shot [the victim]." *Ibid.*

Just as in *Torres* and *Grant*, the Sixth Circuit confused disputed facts with the disputed inferences that could be drawn from those facts. The jury's role is to resolve the facts if the facts are material to the qualified immunity determination. The facts are material to qualified immunity when, based on the plaintiff's version of the facts, the defendant is not entitled to qualified immunity as a matter of law. This was not the case in *Torres*. The jury does not get to

resolve "whether another reasonable or more reasonable interpretation of the events could be constructed" months after the fact. *Hunter v. Bryant*, 502 U.S. at 227-228.

2. Petitioners Did Not Violate Clearly Established Law Of Which A Reasonable Officer Would Have Known.

In the instant case, the arguably disputed facts (did Diana positively identify Torres; did the school police officer say Torres had recently been jumped into a gang; and was Torres "flashing gang signs" in the group photograph) were not material to the qualified immunity determination because resolving these facts in Torres' favor, the arrest remained well supported by probable cause. But even assuming a constitutional violation, petitioners' conduct was not "plainly incompetent" or a knowing violation of the law and they should have been granted qualified immunity. *Malley v. Briggs*, 475 U.S. at 341.

Under settled law, Detectives Roberts and Park are entitled to immunity if "a reasonable police officer could have believed that probable cause existed to arrest [Torres]. Probable cause existed if 'at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing'" that Torres had violated the law. *Hunter v. Bryant*, 502 U.S. at 537, quoting *Beck v. Ohio*, 379 U.S. 89 (1964).

Under California law, where the officers have probable cause to believe the suspect in some way "directly or indirectly, aided the perpetrator or advised

and encouraged the commission of the offense with knowledge of the latter's wrongful purpose," probable cause exists to arrest the suspect as an aider or abettor. *People v. Jones*, 108 Cal. App. 3d 9, 14 (1980). Consequently, "to be an abettor the accused must have instigated or advised the commission of the crime or been present for the purpose of assisting in its commission . . . [sharing] the criminal intent with which the crime was committed . . ." *Id.* at 15 (internal citations and quotations omitted). "Evidentiary considerations which are probative of whether one is an aider and abettor include presence at the scene of the crime, failure to take steps to attempt to prevent the commission of the crime; companionship, flight, and conduct before and after the crime." *Ibid.*

Viewing the facts in the light most favorable to Torres, there was more than a "fair probability" for petitioners to conclude that Torres was the third suspect in the vehicle and that he aided and abetted in the murder and attempted murder. But even assuming for the sake of qualified immunity that probable cause was lacking, petitioners were entitled to qualified immunity because under the circumstances presented "a reasonable police officer could have believed that probable cause existed to arrest [Torres]." *Hunter v. Bryant*, 502 U.S. at 537, quoting *Beck v. Ohio*, 379 U.S. 89 (1964).

A reasonable police officer could have believed Torres was the third suspect in the car. Diana, the eyewitness who spent several hours in the car with all three suspects, provided the detectives with a physical description of the third suspect, told them that the third suspect was a friend of Santillan, and that all

three suspects were members of the CPA gang. Torres matched the description Diana provided. School officials said Torres was friends with Santillian, the driver of the car involved in the shooting, who had already been positively identified and arrested. School officials said Torres and Santillian hung out with the CPA gang, the gang involved in the murder. The recent group photo corroborated the evidence that Torres was friends with Santillian and that they both associated with the CPA gang. And, while Diana may not have positively identified him, she picked Torres' photograph from the six-pack photographic array as the person who looked "most like" the third suspect. Viewing these undisputed facts in their totality, a reasonable police officer could have believed there was probable cause to believe Torres was the third suspect.

A reasonable police officer also could have believed Torres aided and abetted in the murder and attempted murder. Petitioners knew prior to the commission of the crime, Torres spent several hours with the driver and the shooter, who were both known gang members. They knew that Torres had gone into rival gang territory with known gang members and challenged rival gang members by flashing gang hand signs and shouting challenges. They knew that Torres was in the back seat with the shooter just before the murder, at the time of the murder, and after the murder. These facts, viewed in their totality, could have provided a reasonable police officer with probable cause to believe Torres had in some way, "directly or indirectly, aided the perpetrator or advised or advised and encouraged the commission of the offense with knowledge of the latter's wrongful purpose." *People v. Jones*, 108 Cal. App. 3d at 14. An arrest under the circumstances was not an "obvious" violation of the

Fourth Amendment. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). Even the Ninth Circuit conceded, "Reasonable minds could disagree about the existence of probable cause." (Appendix, 20a.) And, since neither Torres nor the Ninth Circuit was able to identify a single case that "squarely governed" the facts in this case, the petitioners were entitled to qualified immunity as a matter of law. *Id. at 201.*

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

DATED: February 10, 2009

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-55817
D.C. No. CV-05-04171-RGK

[Filed November 13, 2008]

RAYMOND TORRES; MARIA ELVA ALMADOR-TORRES, *Plaintiffs-Appellants,*	)
v.	)
CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; BRAD ROBERTS, LAPD Detective; JENNIFER HICKMAN, LAPD Detective; STEVE PARK, LAPD Detective; F. RAINS, LAPD Detective, *Defendants-Appellees.*	)

ORDER AND OPINION

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted
February 12, 2008—Pasadena, California

Opinion Filed August 26, 2008
Opinion Withdrawn November 13, 2008

New Opinion Filed November 13, 2008

Before: Betty B. Fletcher and N. Randy Smith, Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge B. Fletcher

COUNSEL

Nelson E. Brestoff (argued), Moskowitz, Brestoff, Winston & Blinderman, LLP, Valencia, California, Julia A. Follansbee, Follansbee & Associates, Bend, Oregon, for the plaintiffs-appellants.

Rockard J. Delgadillo, Janet G. Bogigian, Amy Jo Field (argued), Los Angeles City Attorney's Office, Los Angeles, California, for the defendants-appellees.

ORDER

The Opinion filed August 26, 2008, slip op. 11723, and appearing at ___ F.3d ___, 2008 WL 3905411 (9th Cir. Aug. 26, 2008), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit.

The panel has voted to deny the petition for panel rehearing. Judge N.R. Smith votes to deny the petition

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

for rehearing en banc and Judges B. Fletcher and King so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

The new Opinion is filed contemporaneously with this order. There is no change in substance.

No new petition for rehearing or rehearing en banc will be entertained.

OPINION

B. FLETCHER, Circuit Judge:

In 2004, plaintiff Raymond Torres, who was then 16 years old, was arrested, without a warrant, on charges of murder and attempted murder. After 162 days of incarceration, Torres was released when the district attorney dismissed the charges against him. Following his release, Torres and his mother ("Plaintiffs") brought a civil rights action against the City of Los Angeles, the Los Angeles Police Department ("LAPD"), and four LAPD detectives ("Defendants"), seeking damages under both federal and state law. After granting summary judgment to the City of Los Angeles and the LAPD, the district court denied two of Plaintiffs' motions in limine and, after all of the parties had presented their evidence to the jury, granted the remaining Defendants' motion for

judgment as a matter of law. Plaintiffs appeal the grant of the motion for judgment as a matter of law as well as the rulings on the motions in limine. We affirm in part, reverse in part, and remand.

I.

The charges leading to Torres' arrest arose from a gang-related shooting in Los Angeles on August 11, 2004. On that day, Josue Santillan, a member of the Canoga Park Alabama street gang ("CPA gang"), was driving a car that contained four other passengers: Diana H., who was seated in the front right passenger seat; Joel Castaneda, who was seated in the back seat directly behind Diana; and two other persons, at least one of them male, who were also seated in the back seat.[1] At one point Santillan drove by a park in the Reseda area, where, according to Diana and other witnesses, the male passengers flashed gang hand signs and shouted challenges at members of the Reseda street gang who were in the park. Santillan then drove away, but the members of the Reseda gang gave chase in a car of their own. When the Reseda gang members' car pulled alongside the car driven by Santillan, Castaneda fired several rounds from a semiautomatic pistol at the Reseda gang members' car, killing the driver and wounding another passenger.

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[1] Diana, who was the detectives' main source of information about the shooting, gave different accounts of who was in the car other than herself, Santillan and Castaneda. At first she stated that only one other person, a male, was in the car; later she stated that two other persons were in the car, one male and one female; and later still she stated that only two other males were in the car.

Detectives Roberts, Hickman, Park and Rains investigated the shooting. On August 25, 2004, two weeks after the shooting, Detectives Roberts and Hickman questioned Diana about the shooting. Diana identified Santillan as the driver and Castaneda as the shooter, and both were subsequently arrested. Diana also expressed her belief that all the male passengers were probably members of the CPA gang.

Detectives Roberts and Hickman asked Diana about the third male passenger who had been sitting directly behind Santillan. Diana told the detectives that she had never seen him before, that she did not know his name, and that she did not remember him well because she had not been paying attention to him. However, Diana was able to describe this third male passenger as Hispanic, 15 or 16 years old, with a complexion darker than hers, and very overweight. Diana also stated that he had some hair. She further described him as having worn a white T-shirt, blue shorts, and white tennis shoes. Detective Roberts acknowledged at trial that Diana's description was "too generic to go anywhere with it."

On September 23, 2004, six weeks after the shooting, the detectives obtained several additional pieces of information in their investigation of the third male passenger, which led them to arrest Torres that same day.

First, Detective Hickman spoke to Danny Steinberg, a school police officer assigned to El Camino High School. Previously, Steinberg had been questioned by an LAPD Juvenile Officer, Marie Lamar, about an outstanding suspect in a murder case. Officer Lamar had described the suspect as a

short and heavy-set Hispanic male with a shaved head who was "dressed down gang-style."[2] Steinberg had informed Officer Lamar that her description matched a student at El Camino— Torres—and that Torres had recently begun hanging out with gang members at El Camino and had begun "dressing down as a gangster" and shaving his head. On September 23, Steinberg repeated the same information to Detective Hickman. There was conflicting testimony at trial, however, as to whether Steinberg also told Officer Lamar and Detective Hickman that Torres had "recently been jumped into the CPA gang," i.e., that Torres had become a member of the gang.

Second, Detectives Hickman and Roberts spoke to an official at El Camino high school, Mark Pomerantz. Pomerantz gave the detectives two color photos of Torres, one older, in which Torres is shown with short dark hair, and the other taken that morning at the detectives' request, in which Torres is shown with a shaven head. In addition, Pomerantz discussed with the detectives a group photo of six young Hispanic males—including Torres and Santillan—that Pomerantz had provided the LAPD a year earlier when it was investigating Santillan in connection with another shooting of a Reseda gang member. The group photo had been taken by a teacher at a school event called "Melody of Words," although Detective Roberts testified at trial that he was unaware of that fact at the time of Torres' arrest.

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[2] The record does not reveal how Officer Lamar had come to believe that the third male passenger had a shaved head and was "dressed down gang-style."

When Pomerantz originally provided the group photo he had informed the LAPD that two of the individuals in the photo (neither of them Torres) were members of the CPA gang. On September 23, Pomerantz told the detectives that Torres and Santillan were friends and hung out. In the group photo, Torres' right hand is not visible and only part of one finger of his left hand is visible. Conflicting testimony was presented at trial as to whether Torres is making a gang sign with his left hand. However, Detectives Roberts and Park both testified that, at the time of Torres' arrest, they were unaware one way or the other whether Torres was a member of the CPA gang.

In all three photos provided by Pomerantz, Torres is wearing a prominent grey metal cross on a chain around his neck. Pomerantz also told Detective Hickman that Torres "always wears [a] grey metal cross on a chain around his neck." Notably, Diana did not say anything about the third male passenger in the car wearing a chain or cross when the detectives spoke to her on August 25, 2004.

Third, Detective Hickman searched Torres' name in six different databases: an adult criminal records database, a juvenile records database, a Department of Motor Vehicles records database, the California Criminal History Record System, the Cal-Gangs database, and the gang card file at the West Valley police station. Detective Hickman found no matches for Torres.

Fourth, Detective Hickman used the most recent photo of Torres she had received from Pomerantz to assemble a photographic identification array of six

individuals called a "six-pack."[3] Detective Hickman used a computer database to find photos of five other individuals to place in the six-pack, which she did by searching for photos based on age and physical characteristics also applicable to Torres. However, while Detective Hickman first searched for photos of persons who were not only young male Hispanics but also "heavy," that search did not yield a sufficiently large selection to fill the six-pack with faces that Detective Hickman considered to be similar to that of Torres. Accordingly, Detective Hickman expanded her search to include non-heavy persons, which did yield a sufficient large selection. Plaintiffs' police procedures expert testified at trial that the resulting six-pack was unduly suggestive because aside from Torres' photo only one other photo was of a visibly "chubby" person, thus significantly increasing the odds that Diana would "identify" Torres in the lineup.

Detectives Roberts, Park and Rains then proceeded to the residence of Diana. Detectives Roberts and Park went inside to show Diana the six-pack; Detective Rains waited outside in his car. Detective Roberts told Diana that he "had possibly identified the 15- to 16-year old chubby boy" and then read her a standard "photographic show-up admonition."

After Detective Roberts handed Diana the six-pack, Diana stared at it—according to Diana for between five and ten minutes—whereupon Detective Roberts asked her at whom she was staring. Diana then indicated that she was staring at photo #6, the photo

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[3] In the six-pack, the photo of Torres is cropped such that the cross hanging from Torres' neck chain is not visible.

of Torres. However, there was conflicting testimony as to whether Diana also stated that the person in photo #6 was the third male passenger in the car, or, on the contrary, whether she stated that she did not know whether it was him or not. It is undisputed, however, that the detectives then asked Diana to write down what she thought, whereupon Diana circled the photo of Torres with a pen and wrote on the six-pack, "I circle the person in #6 because he looks more likely [sic] to the other guy in the car." Detective Roberts acknowledged at trial that, based solely on what Diana wrote on the six-pack, he did not have probable cause to arrest Torres.

When Detectives Roberts and Park rejoined Detective Rains outside Diana's home, Detective Roberts told Rains that Diana had identified Torres as the third male passenger—a statement which Diana testified at trial was false—and said they were going to arrest Torres. Detective Rains was not shown Diana's written statement on the six-pack. Detectives Roberts, Park and Rains then went to Torres' home. When Torres came outside and the detectives approached him, Torres did not try to flee. The detectives engaged in no conversation with Torres but simply arrested him in his mother's presence. Detective Park acknowledged at trial that at the time of Torres' arrest there was no physical evidence linking Torres to the shooting.

Torres was charged with murder and attempted murder based on his alleged role in the shooting of the two Reseda gang members. However, on March 4, 2005, after 162 days of incarceration, Torres was released when the district attorney dismissed the charges against him.

Torres and his mother subsequently filed suit, claiming deprivation of Torres' Fourth Amendment rights, in violation of 42 U.S.C. § 1983, as well as false arrest and negligent infliction of emotional distress, in violation of California law. Defendants moved for partial summary judgment on Plaintiffs' claims against the City of Los Angeles and the LAPD on the ground that Plaintiffs could not prove liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). In their motion, Defendants stated that "[b]ecause triable issues of material fact exist regarding probable cause for Plaintiff's arrest, Defendants move for partial summary judgment on *Monell* liability only." The district court granted the motion, a ruling Plaintiffs do not appeal.

On the eve of trial against the remaining Defendants, the district court denied two of Plaintiffs' motions in limine: a motion for an order barring Defendants' expert witnesses Detective Jack Giroud and Officer Norm Peters from testifying on the ground that they had failed to provide written expert reports as required by Federal Rule of Civil Procedure 26(a)(2)(B); and a motion for an order barring the investigating detectives and all defense experts from testifying that, in their opinion, probable cause existed to arrest Torres.

After all of the parties had presented their evidence to the jury, Defendants orally moved for judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50(a), as to all of Plaintiffs' claims. The district court granted the motion and dismissed Plaintiffs' case. In its written order, the district court concluded that Detectives Hickman and Rains had not been involved in Torres' arrest and therefore could not

be liable. The court further concluded that Detectives Park and Roberts had probable cause to arrest Torres and that, accordingly, Plaintiffs' § 1983 claim and state law claims should be dismissed.[4] Finally, the court concluded that even if Detectives Park and Roberts did not have probable cause to arrest Torres, they were protected from Plaintiffs' § 1983 claim by qualified immunity.[5]

II.

We review de novo the district court's order granting Defendants' motion for judgment as a matter of law under Rule 50(a). *See Santos v. Gates*, 287 F.3d 846, 851 (9th Cir. 2002). "Judgment as a matter of law is appropriate when the evidence presented at trial permits only one reasonable conclusion." *Id.* In other words, "[a] motion for a judgment as a matter of law is properly granted only if no reasonable juror could find in the non-moving party's favor." *El-Hakem v. BJY Inc.*, 415 F.3d 1068, 1072 (9th Cir. 2005). "'The evidence must be viewed in the light most favorable to

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[4] The district court dismissed Plaintiffs' state law claim for negligent infliction of emotional distress because it was predicated on their claims for violation of civil rights and false arrest.

[5] In its written order, the district court made findings of fact and reached conclusions of law as "required by Rule 52 of the Federal Rules of Civil Procedure." This was error because the case was being tried to a jury. *See* Fed. R. Civ. P. 52(a)(1) ("*In an action tried on the facts without a jury or with an advisory jury*, the court must find the facts specially and state its conclusions of law separately." (emphasis added)). Instead, the court should have determined only whether "a reasonable jury would not have a legally sufficient evidentiary basis" to find for the non-moving party. *See* Fed. R. Civ. P. 50(a)(1).

the nonmoving party, and all reasonable inferences must be drawn in favor of that party." *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000). "If conflicting inferences may be drawn from the facts, the case must go to the jury." *Id.*

We also review de novo the district court's finding of probable cause, *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1161 n.14 (9th Cir. 2007), as well as its grant of qualified immunity, *Aguilera v. Baca*, 510 F.3d 1161, 1167 (9th Cir. 2007). We review for an abuse of discretion the district court's evidentiary rulings. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 886 (9th Cir. 2002).

III.

A.

[1] We affirm the district court's dismissal of Plaintiffs' case against Detective Hickman. The evidence is undisputed that Detective Hickman was not present when Torres was arrested, and there is no evidence that Detective Hickman instructed the other detectives to arrest Torres or that any of those detectives consulted with her before making the arrest. Thus, there is no evidence of "integral participation" by Detective Hickman in the alleged constitutional violation. *Chuman v. Wright*, 76 F.3d 292, 294-95 (9th Cir. 1996); *see Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007) (explaining that integral participation requires "some fundamental involvement in the conduct that allegedly caused the violation" and affirming summary judgment in favor of officer who arrived on the scene after the allegedly unconstitutional arrest and officer who provided only

crowd control (citing *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004)); *Motley v. Parks*, 432 F.3d 1072, 1082 (9th Cir. 2005) (en banc) (affirming grant of summary judgment in favor of government agent who did not participate in the allegedly unconstitutional search).

[2] Moreover, although Detective Park testified that Detective Hickman, together with Detective Roberts, was in charge of the investigation of the shooting, there is no evidence that Detective Hickman acted as a supervisor that would impose supervisor liability. *See Motley*, 432 F.3d at 1081 ("A supervisor can be liable under § 1983 if he 'set[s] in motion a series of acts by others . . . , which he knew or reasonably should have known, would cause others to inflict the constitutional injury.'" (modifications in original) (quoting *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991)).

B.

Plaintiffs argue that the district court erred in concluding, as a matter of law, that Detectives Roberts, Park and Rains had probable cause to arrest Torres.[6]

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[6] While the district court dismissed Plaintiffs' case against Detective Rains on the ground that "there was no evidence showing that Rains was involved in the arrest of Plaintiff" because "[a]ccording to the evidence, Rains was only acting as backup during Plaintiff's arrest and did not personally assist in or direct the arrest of Plaintiff," we disagree with this conclusion in light of Rains' own testimony that "I was involved in the arrest."

[3] "Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested." *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). "While conclusive evidence of guilt is of course not necessary under this standard to establish probable cause, '[m]ere suspicion, common rumor, or even strong reason to suspect are not enough.'" *Id.* (quoting *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984)). Under the collective knowledge doctrine, in determining whether probable cause exists for arrest, we look to "the collective knowledge of all the officers involved in the criminal investigation[.]" *United States v. Ramirez*, 473 F.3d 1026, 1032 (9th Cir. 2007) (internal quotation marks omitted).

[4] As the definition of probable cause indicates, the proper inquiry is whether the detectives had probable cause to believe that Torres had committed a crime, not merely that Torres was the third male passenger in the car.[7] While probable cause supports

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[7] Defendants assert that Plaintiffs' case "has always rested on whether there was probable cause to believe that [Torres] was the third suspect in [Diana's] vehicle," not on whether there was probable cause to believe that Torres was guilty of murder. However, we consider only the latter question because an arrest is lawful under the Fourth Amendment only if it is accompanied by probable cause to believe that the arrestee has committed, or is committing, an offense. *See, e.g.*, *Lopez*, 482 F.3d at 1072. Mere presence in a vehicle in which a crime is being committed is not an offense. *See United States v. Herrera-Gonzalez*, 263 F.3d 1092, 1097-98 (9th Cir. 2001) ("Sometimes youthful inexperience and lack of common sense, impecuniousness, or personal relationships

an arrest so long as the arresting officers had probable cause to arrest the suspect for any criminal offense, regardless of their stated reason for the arrest, *see Devenpeck v. Alford*, 543 U.S. 146, 153-55 (2004); *see also Virginia v. Moore*, 128 S. Ct. 1598, 1604 (2008), an arrest is still unlawful unless probable cause existed under a specific criminal statute, *see Devenpeck*, 543 U.S. at 156. Defendants do not contend that there was probable cause to believe that Torres had committed any offense besides murder and attempted murder. In California, both offenses require an unlawful killing with malice aforethought, *see* Cal. Penal Code §§ 187, 664, although malice is implied "when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life[,]" *People v. Cook*, 139 P.3d 492, 515 (Cal. 2006) (citation omitted). Therefore, the question is whether the detectives had probable cause to believe that Torres had acted in concert with the shooter, Castaneda, with conscious disregard for human life.[8]

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may bring the innocent into continuing proximity with the guilty, but our line of 'mere presence' cases requires acquittal in the absence of evidence of intentional participation.").

[8] Defendants "presume" that Torres was arrested and charged with murder on a provocative act murder theory, a theory that can be applied in "situations in which criminal defendants neither kill nor intend to kill, but cause a third party to kill in response to their life-threatening provocative acts." *People v. Cervantes*, 29 P.3d 225, 230 (Cal. 2001). However, to the extent Defendants suggest that Torres' alleged flashing of gang signs and shouting of challenges, alone, could constitute the intentional act necessary for murder liability, we disagree. "To satisfy the 'actus reus' element of [provocative act murder] the defendant or one of his

In reviewing the grant of a motion for judgment as a matter of law, we must determine whether a reasonable jury could have concluded that the detectives lacked probable cause to arrest Torres. *See, e.g.*, *Monroe v. City of Phoenix, Arizona*, 248 F.3d 851, 861-62 (9th Cir. 2001) (affirming denial of Rule 50(a) motion in excessive force case because "[a] reasonable jury could conclude that [the defendant officer] had probable cause to believe that [the plaintiff] posed a threat of serious physical harm"), *overruled on other grounds as recognized in Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007). Defendants concede that, because we must view the evidence in the light most favorable to Plaintiffs and draw all reasonable inferences in their favor, we must assume the following: that school police officer Steinberg did not tell Officer Lamar or Detective Hickman that Torres had "recently been jumped into the CPA gang"; that in the group photo Torres is not visibly making a gang sign (or that it was unreasonable for the detectives to conclude that he is); and that Diana did not positively identify Torres as the third male passenger in the car.

We conclude that, based on the information in the detectives' possession at the time of the arrest, a

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confederates must commit an act which provokes a third party into firing the fatal shot." *In re Aurelio R.*, 212 Cal. Rptr. 868, 870 (Cal. Ct. App. 1985). "[N]o criminal liability attaches to an initial remote actor for an unlawful killing that results from an independent intervening cause (i.e., a superseding cause)." *Cervantes*, 29 P.3d at 231. Here, the evidence shows that Castaneda fired the shots not because he was provoked by his fellow passenger's flashing of gang signs and shouting of challenges, but rather by the fact that the Reseda gang members chased the car driven by Santillan.

reasonable jury could have found that the detectives lacked probable cause to believe that Torres had been the third male passenger in the car and had acted in concert with the shooter with conscious disregard for human life.

[5] First, Diana's general description of the third male passenger is not sufficient to create probable cause. "'Under the law of this Circuit, mere resemblance to a general description is not enough to establish probable cause.'" *Lopez*, 482 F.3d at 1073 (quoting *Grant v. City of Long Beach*, 315 F.3d 1081, 1088 (9th Cir. 2002), *amended by* 334 F.3d 795 (9th Cir. 2002). For example, in *United States v. Ricardo D.*, we held that the fact that the defendant matched descriptions of the crime suspect as a "young, thin man, not too tall" and a "young, Mexican male" were insufficient to create probable cause. 912 F.2d 337, 342 (9th Cir. 1990). Here, Diana's description of the third male passenger was slightly more detailed than the description in *Ricardo D.* but, at the same time, did not match Torres insofar as Diana described the third male passenger as having some hair. Moreover, the fact that Diana did not mention a chain or cross around the passenger's neck casts further doubt on whether Torres matched Diana's general description. Accordingly, Diana's description alone was clearly insufficient to create probable cause as a matter of law.

[6] Second, a reasonable jury could have found that Diana's "identification" of Torres in the six-pack did not create probable cause because the six-pack was suggestive and the "identification" was not sufficiently reliable. *See Grant*, 315 F.3d at 1086-88 (holding that two identifications did not create probable cause as a

matter of law because six-pack was arguably suggestive and identifications lacked sufficient indicia of reliability).

The Supreme Court has cautioned that "[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Here, only one other photo in the six-pack besides the photo of Torres was of a visibly overweight individual and thus of a person who fit Diana's general description. In addition, Detective Roberts told Diana, before handing her the six-pack, that the detectives had "possibly identified the 15 to 16 year-old chubby boy." According to Plaintiffs' expert, that statement was "absolutely forbidden" and "contamine[d] the identification," presumably because it informed Diana that the detectives' suspect was among the photos in the six-pack and thus could have pressured her to make an identification. Based on these facts, a reasonable jury could have found the six-pack to be impermissibly suggestive.

Although a suggestive photo array "may still serve as a basis for probable cause if sufficient indicia of reliability are present," *Grant*, 315 F.3d at 1087 (citing *United States v. Hanigan*, 681 F.2d 1127, 1131 (9th Cir. 1982)), here a reasonable jury could have found that no sufficient indicia of reliability were present. "Indicia of reliability include: 1) the opportunity to view the criminal at the time of the crime; 2) the degree of attention paid to the criminal; 3) the accuracy of the prior descriptions of the criminal; 4) the level of certainty demonstrated at the time of the

confrontation; and 5) [ ] the length of time between the crime and the confrontation." *Id.* (citing *Gray v. Klauser*, 282 F.3d 633, 639 (9th Cir. 2002)). While Diana spent several hours in the car with the third male passenger, she had never seen him before and did not pay attention to him. In addition, as previously discussed, Diana gave only a general description of the third male passenger, which did not match Torres in two important respects (head of hair and no mention of prominent cross). Further, Diana was not shown the six-pack until six weeks after the shooting. When she was handed the six-pack, she stared at it in silence for between five and ten minutes and then, when asked at whom she was staring, made only a *comparative* identification: she stated that Torres looked more like the third male passenger than the other persons depicted in the six-pack (only one of whom was visibly overweight), but that she was not sure whether or not it actually was him. Thus, a reasonable jury could have concluded that Diana's identification lacked sufficient indicia of reliability and thus did not provide the detectives with probable cause. Although Detective Rains had been told that Diana had positively identified Torres, we nevertheless conclude that the reliability of the identification was sufficiently questionable for other reasons to allow a reasonable jury to conclude that Rains, too, lacked probable cause.

[7] While the detectives also had the additional information that Torres was friends with Santillan, hung out with gang members, and had recently begun "dressing down as a gangster," they had no information that Torres was actually a member of the CPA gang (or any other gang), and Torres' name did not come up in any of the six criminal databases searched by Detective Hickman. Moreover, although

fingerprints of Santillan were found in the car, there was no physical evidence linking Torres to the vehicle. In addition, the fact that Torres made no attempt to flee when the detectives came to arrest him, while by no means dispositive, further indicates that reasonable minds could disagree about the existence of probable cause. *See Ricardo D.*, 912 F.2d at 342.

[8] Finally, the detectives lacked evidence that the third male passenger had acted in concert with Castaneda and had the requisite mental state to be guilty of murder and attempted murder. There is no evidence that the third male passenger helped decide or make plans to challenge or shoot at rival gang members; that he knew that Castaneda had a gun; or that he assisted Castaneda in firing the shots. Thus, aside from the evidence that the third male passenger had flashed gang signs and shouted challenges, there was no evidence that the third male passenger had acted in concert with Castaneda and had done so with a conscious disregard for human life. This dearth of evidence as to the third male passenger's culpability further widens the gap between mere suspicion and probable cause to believe that Torres had committed a crime.

[9] Accordingly, we conclude that a reasonable jury could have found that Detectives Roberts, Park and Rains lacked probable cause to believe that Torres had committed a crime. The district court therefore erred in finding probable cause as a matter of law.

C.

We next consider whether Detectives Roberts, Park and Rains were nevertheless protected by qualified

immunity. When a police officer asserts qualified immunity, we apply a two-part analysis under *Saucier v. Katz*, 533 U.S. 194 (2001). The first question is whether the facts, when taken in the light most favorable to Plaintiffs, show that Defendants' conduct violated a constitutional right. *Id.* at 201. The second question is whether the constitutional right at issue is "clearly established." *Id.* at 202.

As Defendants argue, qualified immunity is a question of law, not a question of fact. *Hunter v. Bryant*, 502 U.S. 224 (1991). But Defendants are only entitled to qualified immunity as a matter of law if, taking the facts in the light most favorable to Torres, they violated no clearly established constitutional right. The court must deny the motion for judgment as a matter of law if reasonable jurors could believe that Defendants violated Torres' constitutional right, and the right at issue was clearly established.

[10] Plaintiffs here appeal the grant of a Rule 50(a) motion made after completion of the trial but before a jury verdict. While the Supreme Court has encouraged resolution of the qualified immunity issue early on in the lawsuit, such as at the summary judgment stage, *see Saucier*, 533 U.S. at 200 ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive."), Defendants chose not to move for summary judgment on qualified immunity grounds, acknowledging that "triable issues of material fact exist regarding probable cause for Plaintiff's arrest." Thus, the case proceeded to trial before a jury. However, the same issues of material fact also prevent the court from granting the officers' motion for

judgment as a matter of law. *See, e.g.*, *Grant*, 315 F.3d at 1090 (denying officers' motion for judgment as a matter of law on qualified immunity because "viewed in the light most favorable to the non-moving party, there was enough evidence for a reasonable jury to conclude that reasonable officers would not have acted as [the defendants] did in arresting [the plaintiff]."); *LaLonde*, 204 F.3d at 953 ("If . . . there is a material dispute as to the facts regarding what the officer or the plaintiff actually did, the case must proceed to trial, before a jury if requested." (citing *Act Up! / Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993)); *Thompson v. Mahre*, 110 F.3d 716, 719 (9th Cir. 1997) ("[W]here there is a genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of summary judgment and, if there is a jury demand and a material issue of fact, the Seventh Amendment, require submission to a jury."); *see also Sloman v. Tadlock*, 21 F.3d 1462, 1468 (9th Cir. 1994) (explaining that the reasons for the existence of the qualified immunity doctrine "do not . . . suggest that a *judicial* determination at [the trial] stage is necessarily better than a jury verdict" (emphasis in original)).[9] Indeed, we have explained that "sending the factual issues to the jury but reserving to the judge the ultimate 'reasonable officer' determination leads to serious logistical difficulties." *Sloman*, 21 F.3d at 1468.

[11] Defendants contend that our decision in *Peng v. Mei Chin Penghu*, 335 F.3d 970 (9th Cir. 2003),

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[9] As we noted in *Sloman*, when a case proceeds to trial "qualified immunity can no longer rightly be called an 'immunity from suit' (since the suit has already proceeded to its conclusion); rather, it is now effectively a defense." 21 F.3d at 1468 n.6.

supports their contention that a court, not a jury, must decide the qualified immunity issue here. We disagree. In *Peng*, the district court had determined at the summary judgment stage that the defendant officer was entitled to qualified immunity. *Id.* at 972-73. On appeal, Peng argued, first, that the existence of disputes of fact precluded the district court from granting summary judgment on the issue of qualified immunity, and, second, that because more than one reasonable inference could be drawn from the undisputed facts regarding the existence of probable cause, the question of probable cause was one for the jury and not the court. *Id.* at 978-79. Rejecting both arguments, this court held that the factual disputes were not material to the qualified immunity issue, *id.*, and that, "*where the material, historical facts are not in dispute*, and the only disputes involve what inferences properly may be drawn from those historical facts, it is appropriate for this court to decide whether probable cause existed at the time [the officer] arrested Peng," *id.* at 979-80 (emphasis added).

[12] However, in this case historical facts material to the qualified immunity determination are in dispute. Disputes of fact exist as to whether Diana positively identified Torres, whether school police officer Steinberg told Officer Lamar and/or Detective Hickman that Torres had "recently been jumped into the CPA gang," and whether it was reasonable for the detectives to believe that in the group photo Torres was making a gang sign despite the fact that only one of Torres' fingers is visible in the photo. These disputes of fact are material because they go to what the detectives knew at the time they arrested Torres and, accordingly, to whether they had probable cause, and reasonably believed they had probable cause, to do so.

Taking these facts in the light most favorable to Torres, a reasonable officer would have known that he lacked probable cause for the arrest. Accordingly, *Peng* does not help Defendants.

With respect to the first *Saucier* question, we have already determined that a reasonable jury could find that Defendants violated Torres' constitutional right to be free from arrest without probable cause. *See Grant*, 315 F.3d at 1089 ("Courts have long held that the Fourth Amendment requires probable cause before an officer may arrest an individual." (citing *Beck*, 379 U.S. at 91)). In answering the second question, whether the constitutional right was clearly established, we do not consider the right as a "general proposition." *Saucier*, 533 U.S. at 201. Rather, "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. "Qualified immunity is an objective inquiry—whether the officers subjectively believed that they had probable cause to arrest [Torres] is irrelevant." *Grant*, 315 F.3d at 1089 (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

[13] In light of the arguably suggestive six-pack, Diana's merely comparative identification six weeks after the shooting, the lack of direct evidence that Torres was a member of a gang (let alone the CPA gang), the lack of physical evidence tying Torres to the shooting, the fact that Torres did not attempt to flee when the detectives approached him, and the lack of evidence that the third male passenger acted in concert with Castaneda with conscious disregard for human life, "[a] material issue of fact existed as to whether a reasonable officer would have relied on [the information in the detectives' possession] without

further verification." *Grant*, 315 F.3d at 1090. Accordingly, "there was enough evidence for a reasonable jury to conclude that reasonable officers would not have acted as [Detectives Roberts and Park] did in arresting [Torres]." *Id.* We therefore conclude that Detectives Roberts and Park were not entitled to qualified immunity as a matter of law.

However, we reach a different conclusion as to Detective Rains. Because Detective Roberts told Rains that Diana had identified Torres and because he did not show Rains Diana's written statement on the six-pack, Rains believed that Diana had positively identified Torres.

While "[a]ll officers . . . have an ongoing duty to make appropriate inquiries regarding the facts received or to further investigate if sufficient details are relayed," *Motley*, 432 F.3d at 1081 (citation omitted), we have explained that "[w]here an officer has an objectively reasonable, good-faith belief that he is acting pursuant to proper authority, he cannot be held liable if the information supplied by other officers turns out to be erroneous." *id.* at 1082 (citing *United States v. Hensley*, 469 U.S. 221, 232 (1985)). "The lynchpin is whether the officer's reliance on the information was objectively reasonable." *Id.*

[14] In light of what Detective Roberts told Detective Rains after showing the six-pack to Diana, and in light of the undisputed fact that, of the four detectives, Detective Rains was the least involved in the investigation, we conclude as a matter of law that Detectives Rains reasonably relied on the (allegedly false) statement by Detective Roberts that Diana had identified Torres. Based on this conclusion, we further

conclude as a matter of law that a reasonable officer in Rains' position would have believed he had probable cause to arrest Torres. Accordingly, Detective Rains was entitled to qualified immunity as a matter of law.

D.

We deal with the following evidentiary issues to guide the district court on remand. Plaintiffs contend that the district court abused its discretion in denying their motion in limine seeking to bar the testimony of Defendants' expert witnesses Detective Jack Giroud and Officer Norm Peters on the ground that Defendants failed to provide Plaintiffs written expert reports for those witness pursuant to Federal Rule of Civil Procedure 26(a)(2)(B).

Rule 26(a)(2)(B) provides that, "[u]nless stipulated or ordered by the court, [the disclosure of the identity of witnesses pursuant to Rule 26(a)(2)(A)] must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). We have explained that "Rule 37(c)(1) gives teeth to [this requirement] by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Yeti by*

Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001).[10]

[15] We agree with Plaintiffs that Officer Peters should not have been permitted to testify without providing a written expert report. Peters, whom Defendants called as a "gang specialist," testified that he was regularly employed to give expert opinions in court about gangs. Accordingly, Peters falls squarely in the category of witnesses to which Rule 26(a)(2)(B) applies.

We reject Defendants' argument that Plaintiffs were required, but failed, to articulate how they would be prejudiced if they were not provided an expert witness report. Defendants advance two bases for their argument. First, they contend that the purpose of an expert report is "the elimination of unfair surprise to the opposing party and the conservation of resources," *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995), and that because "Rule 26 focuses not on the status of the witness, but rather on the substance of the testimony," *Patel v. Gayes*, 984 F.2d 214, 218 (7th Cir. 1993) (superseded on other grounds by amendment to the Federal Rules of Civil Procedure, as recognized in *Musser v. Gentiva Health*

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[10] Rule 37(c)(1) provides in relevant part:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.

Fed. R. Civ. P. 37(c)(1).

Servs., 356 F.3d 751, 757 n.2 (7th Cir. 2004)), Plaintiffs must articulate how the failure to provide them with an expert report led to surprise at trial. This contention fails. In *Patel*, the Seventh Circuit focused on the substance of the testimony rather than the status of the witness *not* to determine whether the party moving under Rule 26 would be prejudiced by the lack of an expert report but *only* to determine whether the witnesses in question were experts for purposes of Rule 26(a)(2)(B) or instead fell under the "treating physician" exception and therefore were not required to prepare an expert report in the first place. *See Patel*, 984 F.2d at 213. Thus, *Patel* does not support Defendants' argument.

The second basis for Defendants' argument is that Rule 37(c)(1) provides that a party who fails to comply with Rule 26(a) may not use the witness in question to supply evidence at trial "*unless the failure was substantially justified or is harmless.*" Fed. R. Civ. P. 37(c)(1) (emphasis added). Based on this Rule, Defendants contend that Officer Peters could testify without providing an expert report because Plaintiffs failed to articulate how they would be prejudiced without such a report. This contention also fails. Rule 37(c)(1) provides a sanction for failure to comply with the disclosure requirements of Rule 26(a). *See* Fed R. Civ. P. 37 advisory committee's note, 1993 Amendments. In determining whether this sanction should be imposed, the burden is on the party facing the sanction—i.e., Defendants—to demonstrate that the failure to comply with Rule 26(a) is substantially justified or harmless. *See Yeti by Molly, Ltd.*, 259 F.3d at 1107 ("Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness."). Thus, Plaintiffs were not required to articulate how

they would be prejudiced by Defendants' failure to provide an expert report. Because the district court denied Plaintiffs' motion in limine without explanation, there is no basis for us to conclude that the failure to provide an expert report was substantially justified or harmless for purposes of Rule 37(c)(1).

[16] Therefore, we conclude that the district court abused its discretion in denying Plaintiffs' in limine motion. We instruct the court, on remand and upon proper motion by Plaintiffs, to require that Defendants, pursuant to Rule 26(a)(2)(B), provide Plaintiffs with an expert report prepared by Officer Peters if they wish to call him as an expert witness.

However, we do not reach the same conclusion with respect to Detective Giroud. While Defendants concede that Detective Giroud was an expert witness, not all expert witnesses must provide an expert report. By exclusion, Rule 26(a)(2)(B) contemplates that individuals who are employed by a party and whose duties do not regularly involve giving expert testimony need not provide an expert report. *See, e.g.*, *Watson v. United States*, 485 F.3d 1100, 1107 (10th Cir. 2007); *Bank of China, New York Branch v. NBM LLC*, 359 F.3d 171, 182 n.13 (2d Cir. 2004). We have found no evidence in the record that the duties of Detective Giroud, who was employed by the LAPD, regularly involved giving expert testimony. Accordingly, on this record, we cannot determine whether Rule 26(a)(2)(B) applied to him. We therefore leave it to the district court, on remand, to determine whether Rule

26(a)(2)(B) requires Defendants to provide Plaintiffs with an expert report prepared by Detective Giroud.[11]

IV.

We affirm the district court's dismissal of Plaintiffs' case against Detective Hickman and of Plaintiffs § 1983 claim against Detective Rains.[12] We reverse the grant of judgment as a matter of law as to Detectives Roberts and Park. We reverse in part the denial of Plaintiffs' in limine motions.

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[11] Keeping in mind that the inquiry is whether objectively the officers reasonably believed they had probable cause, we also agree with Plaintiffs that the district court abused its discretion in denying their motion in limine seeking to bar Defendants' witnesses from testifying as to their own opinion about whether there was probable cause to arrest Torres. *See Stuart v. United States*, 23 F.3d 1483, 1487 (9th Cir. 1994) (upholding district court's ruling that barred plaintiff's expert from opining as to whether probable cause existed on the ground that the jury was more suited than the expert to answer the question); *see also Peterson v. City of Plymouth*, 60 F.3d 469, 476 n.10 (8th Cir. 1995); *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1998). Defendants did not address this issue in their brief and effectively conceded the issue at oral argument. Accordingly, we instruct the district court, on remand, to bar Defendants' witnesses from testifying as to their opinion that they had probable cause to arrest Torres.

[12] Because we conclude that a reasonable jury could have found that all Defendants, including Detective Rains, lacked probable cause to arrest Torres, Plaintiffs' California law claims against Detective Rains, which are not affected by our conclusion that Rains is protected by qualified immunity, should not have been dismissed. *See Blankenhorn*, 485 F.3d at 489 (Berzon, J., concurring in part and dissenting in part); *Brown v. Li*, 308 F.3d 939, 955 (9th Cir. 2002).

[17] Plaintiffs are awarded costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 05-4171 RGK (FMOx)

[Filed June 6, 2006]

R.T. and MARIA ELVA AMADOR-TORRES,	)
Plaintiffs,	)
vs.	)
CITY OF LOS ANGELES; L.A.P.D.; L.A.P.D. DETECTIVE ROBERTS, BRAD; L.A.P.D. DETECTIVE HICKMAN, JENNIFER; L.A.P.D. DETECTIVE PARK, STEVE; and L.A.P.D. DETECTIVE RAINS, F.,	)
Defendants.	)

TRIAL ORDER

I. INTRODUCTION

R.T. ("Plaintiff") and his mother, Maria Elva Amador-Torres, filed suit on June 9, 2005, against the City of Los Angeles, Los Angeles Police Department

("LAPD"), and LAPD Detectives Steve Park, Brad Roberts, Jennifer Hickman, and Foster Rains (collectively, "Defendants"). Plaintiff alleged the following causes of action: (1) violation of Plaintiff's civil rights under 42 U.S.C. § 1983; (2) false arrest; and (3) negligent infliction of emotional distress.

Trial of this case commenced on May 17, 2006. On May 19, 2006, after Plaintiff and Defendants rested, the Court granted Defendants' Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(a) on all of Plaintiff's claims. The present opinion explains the Court's findings of fact and conclusions of law.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This opinion serves as the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure. Any finding of fact that actually constitutes a conclusion of law is adopted as such, with the converse also being true.

A. Findings of Fact

1. In the drive-by shooting, the eyewitness described all individuals in the car as being members of the Canoga Park Alabama ("CPA") gang.

2. The eyewitness described the suspect as being seated in the rear seat of the vehicle with the gunman and said the suspect was male, Hispanic, short, chunky, and around sixteen years of age.

3. The eyewitness said the driver of the vehicle was her boyfriend, who went to the same high school as Plaintiff, and all individuals in the vehicle were CPA members.

4. Certain information was given to the Los Angeles Police Department by school officials from Plaintiff's school. This information includes:

    a. School police said that Plaintiff had recently changed his appearance and started associating with known CPA members at his school.

    b. Plaintiff fit the physical description of the suspect. *See Findings of Fact #2, supra.*

    c. A picture was given to the LAPD of what appeared to be a gang photograph of six individuals. At least three of the individuals in the photograph were known CPA gang members. One of the individuals was the driver involved in the drive-by shooting.

        i. Plaintiff was among the six individuals posing in the photograph.

        ii. Various individuals in the photograph are making gang-related gestures with their hands.

        iii. Defendants testified that when they viewed the photograph, they were of the opinion that Plaintiff was posing and making gang-related gestures.

5. A recent photograph of Plaintiff was given to the LAPD and placed in a six-pack photo lineup consisting of photographs of six different individuals.

6. Plaintiff's expert based his assumption of no probable cause for Plaintiff's arrest on the fact that there was only a tentative identification of Plaintiff made in the photo lineup because the eyewitness wrote "looks more likely [sic] to the other guy in the car" and Defendants did not write in their notes that there was a positive identification of Plaintiff by the eyewitness.

7. Plaintiff's expert's opinion was based only on the eyewitness' tentative identification of Plaintiff. The expert discounted any other factors as elements for probable cause. *See Findings of Fact #2-4, supra*. Therefore, the expert gave no opinion regarding probable cause based on a tentative identification and the other factors.

8. Defendant's expert testified that a positive identification without the other factors constitutes sufficient probable cause. Additionally, Defendant's expert testified there was probable cause when a tentative identification and all of the other factors are collectively considered.

9. When first shown the photograph lineup, the eyewitness stared for a long time at the suspect's picture, photograph #6.

10. The eyewitness testified that she did not intend to give Defendants a positive identification of Plaintiff as a suspect, but she admitted on cross-examination that she may have said "that's him" while pointing at Plaintiff's photograph in the lineup. The eyewitness further testified that she cannot remember whether or not she may have said this while viewing the photo lineup.

11. The eyewitness previously testified at another trial that she pointed at Plaintiff's picture and said "that's him."

12. Detective Hickman was not involved in Plaintiff's arrest, nor did she direct anyone to arrest Plaintiff.

13. Detective Rains was acting as backup at the time of plaintiff's arrest. Detective Rains did not personally arrest Plaintiff.

B. Conclusions of Law

1. *Defendants had Probable Cause to Arrest Plaintiff*

It is undisputed that police "may arrest a person without a warrant if the arrest is supported by probable cause." *United States v. Valencia-Amezcua*, 278 F.3d 901, 906 (9th Cir. 2002) (citing *United States v. Hillison*, 733 F.2d 692, 697 (9th Cir. 1984)). Probable cause exists if "under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the suspect] had committed a

crime." *Id.* (internal quotation marks and citations omitted). Moreover, "law enforcement officers may draw upon their experience and expertise in determining the existence of probable cause." *United States v. Garza*, 980 F.2d 546, 550 (9th Cir. 1992).

Based on the evidence presented during trial, the Court finds as a matter of law that probable cause existed to arrest Plaintiff. Two Detectives testified that the eyewitness made a positive identification of Plaintiff from the six-pack photo lineup. Based on the expert testimony presented at trial by Defendants' expert witness, a positive identification of Plaintiff by the eyewitness establishes sufficient probable cause for Plaintiff's arrest.[1] Under these circumstances, The Court finds there was probable cause to arrest Plaintiff for his suspected involvement in the drive-by shooting.

Alternatively, the evidence supports a finding of probable cause even if the eyewitness did not make a positive identification of plaintiff from the photo lineup. The eyewitness testified that she may have made a positive identification of plaintiff from the photo lineup, but was unable to remember if she actually made a positive identification. Assuming that the eyewitness only made a tentative identification of Plaintiff from the photo lineup, the Court finds that a tentative identification combined with all of the other factors known to Defendants, constitutes sufficient

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[1] Plaintiff's expert witness also testified that a positive identification of Plaintiff by the eyewitness would establish probable cause.

probable cause.[2] This finding is based on the expert opinion given at trial by Defendant's expert who said that a finding of probable cause for the arrest could be based on a tentative identification combined with the other factors.[3]

In sum, a positive identification of Plaintiff by the eyewitness or a tentative identification combined with the other factors provides sufficient probable cause for Plaintiff's arrest as a matter of law. Thus, the Court finds that, given the totality of the circumstances, Defendants had probable cause to arrest Plaintiff.[4]

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[2] The other factors include Plaintiff matching the physical description of the suspect *(see Findings of Fact #2)*, Plaintiff's recent change of appearance and association with known CPA members, and Plaintiff's appearance in a photo with other known CPA members who are making gang-related gestures with their hands *(see Findings of Fact #4)*.

[3] Plaintiff's expert did not give any opinion on whether a tentative identification combined with the other factors provided probable cause. Plaintiff's expert's opinion was based only on a tentative identification and he discounted all other factors.

[4] Moreover, with regards to Detectives Hickman and Rains, neither Detective was personally involved in Plaintiff's arrest. There was no evidence presented that Hickman was involved in or directed any other officer to arrest Plaintiff. In fact, Hickman participated only in the investigation into Plaintiff's suspected involvement in the shooting. As to Detective Rains, there was no evidence showing that Rains was involved in the arrest of Plaintiff. According to the evidence, Rains was only acting as backup during Plaintiff's arrest and did not personally assist in or direct the arrest of Plaintiff. In light of the facts surrounding Hickman and Rains' involvement in the matter, as well as the lack of any evidence to the contrary, the Court finds that the officers were not personally involved in Plaintiff's arrest.

2. *Defendants are Entitled to Qualified Immunity*

Based upon the above findings of fact, and for the following reasons, the Court finds that even if Defendants did not have probable cause to arrest Plaintiff, Defendants would nevertheless be entitled to qualified immunity against Plaintiff's claims.

Generally, the actions of government officials are protected from civil liability under the doctrine of qualified immunity. *Camarillo v. McCarthy,* 998 F.2d 638, 639 (9th Cir. 1993) (citing *Harlow v. Fitzgerald,* 457 US. 800, 818 (1982)). When a public official asserts qualified immunity from liability in a Section 1983 action, the Court must determine whether, in light of clearly established principles governing the conduct in question, the official objectively could have believed that his conduct was lawful *Act Up!/ Portland v. Bagley,* 988 F.2d 868, 871 (9th Cir. 1993) (citing *Anderson v. Creighton,* 483 US. 635, 641 (1987)). The Court must determine whether officials acted reasonably under settled law in the circumstances, not whether another reasonable approach can be invented after the fact. *Hemphill v. Kincheloe,* 987 F.2d 589, 591-92 (9th Cir. 1993).

The Supreme Court has instructed that qualified immunity shields officers from § 1983 actions where a reasonable officer could conclude, even if he is mistaken, that probable cause is present. *See Hunter v. Bryant,* 502 U.S. 224, 227 (1991). Moreover, the qualified immunity doctrine "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Id.* at 229. Because qualified immunity is an immunity from suit rather than a mere defense of liability, it is

important to resolve immunity questions at the earliest possible stage of litigation. *Id.* at 227 (internal quotations and citations omitted).

Based on the arguments and evidence presented, the Court has determined that there is clearly no evidence showing that Defendants knew or should have known they were violating Plaintiff's rights by the false arrest of plaintiff. Moreover, there has been no evidence or suggestion that Defendants deliberately lied or falsified evidence in order to have probable cause to arrest Plaintiff. The only issue is whether all of the facts known to Defendants at the time of the arrest justify a finding of probable cause. Based on the facts and evidence in this case as stated above, the Court finds that Defendants did have probable cause to arrest Plaintiff. Even if the Court is mistaken in finding probable cause, Defendants are still entitled to qualified immunity because they were reasonable in coming to the same conclusion as the Court regarding the existence of probable cause. Thus, Defendants are entitled to qualified immunity against Plaintiff's claims.

3. *Plaintiff's State Law Claim for Negligent Infliction of Emotional Distress*

As stated above, Plaintiffwas unable to maintain causes of action for the alleged violation of his civil rights under 42 U.S.C. § 1983 and for false arrest. The Court finds no merit in Plaintiff's remaining claim for negligent infliction of emotional distress which is predicated on Plaintiff's claims for violation of his civil rights and false arrest. As such, Defendants are entitled to judgment with respect to Plaintiff's claim for negligent infliction of emotional distress.

III. CONCLUSION

Based on the foregoing, the Court grants judgment in favor of Defendants. The Court finds in favor of Defendants as follows:

(1) Detective Hickman was not personally involved in Plaintiff's arrest;

(2) Detective Rains was not personally involved in Plaintiff's arrest;

(3) As to Detectives Park and Roberts, the evidence shows that the totality of circumstances provided the Detectives with probable cause. The Court finds that the eyewitness' positive identification of Plaintiff in the photo lineup or the tentative identification, along with the other factors, provided sufficient probable cause as a matter of law;

(4) Defendants are entitled to qualified immunity against Plaintiff's claims; and

(5) Court finds that Defendants had probable cause to arrest Plaintiff, thus Plaintiff's claim for negligent infliction of emotional distress fails.

IT IS SO ORDERED.

DATED: JUN 6 2006

/s/
R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

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FILED
MAR 10 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-1037

In The
Supreme Court of the United States

CITY OF LOS ANGELES, LOS ANGELES POLICE DEPARTMENT, BRAD ROBERTS, JENNIFER HICKMAN, STEVE PARK, AND FOSTER RAINS,
Petitioners,

v.

RAYMOND TORRES AND MARIA ELVA AMADOR TORRES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Court of Appeals for the Ninth Circuit reversed the district court's grant of a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) on the issue of qualified immunity. Based upon the disputed issues of material fact at the close of evidence, the court of appeals determined that if all reasonable inferences were drawn in favor of Respondent Raymond Torres as Rule 50(a) requires, a reasonable jury could have reached a verdict in his favor on his Section 1983 claim that he was arrested without a warrant and in the absence of probable cause.

Petitioners argue that *Hunter v. Bryant*, 502 U.S. 224 (1991)(per curiam), which holds that qualified immunity is a matter of law for the court *under the circumstances of that case*, should be extended to "trump" Rule 50(a)'s mandate that the trial court weigh the sufficiency of the evidence using the "reasonable jury" standard, and that this case is an appropriate vehicle for this Court to say so. The issue, simply stated, is whether the trial court should decide the material disputed facts pursuant to a Rule 50(a) motion when there is a defense of qualified immunity.

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The opinion of the Court of Appeals, Pet. App. 1a-31a, is reported at 548 F.3d 1147 (9th Cir. 2008). The district court's judgment, Pet. App. 32a-41a, is unreported.

STATEMENT OF THE CASE

This case arises from a suit for damages under 42 U.S.C. § 1983, alleging that Petitioners' warrantless arrest of Respondent Raymond Torres violated his right under the Fourth and Fourteenth Amendments not to be arrested without probable cause.

The key issue on certiorari involves the application of qualified immunity in the context of a Rule 50(a) motion for judgment as a matter of law. Rule 50(a) is a motion to the district court, requiring that court to "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence[.]" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-151 (2000). According to the court of appeals, Petitioners "are only entitled to qualified immunity as a matter of law if, taking the facts in the light most favorable to Torres, they violated no clearly established constitutional right." Pet. App. 21a. If the facts are in dispute, or if the facts favorable to Torres demonstrate that a reasonable jury could conclude that Petitioners violated Torres's clearly established constitutional right, the district court was required to deny the Rule 50(a) motion, not grant it.

A Rule 50(a) motion may be made "[i]f a party has been fully heard on an issue during a jury trial," Rule

50(a)(1), and "at any time before the case is submitted to the jury." Rule 50(a)(2). Thus, Rule 50(a) presumes a jury has heard all the evidence, but has not yet had the case submitted for their consideration. By the time a Rule 50(a) motion is made, litigation is long past its initial stages.

Here, as Rule 50(a) provides, at the conclusion of the evidentiary phase of the trial – but before closing argument, instructions to the jury, and a verdict – Petitioners orally moved to dismiss the case, arguing there was probable cause and as a "fallback," qualified immunity. The district court granted the motion, holding in part that all of the Petitioners were entitled to qualified immunity. On appeal, the court of appeals affirmed in part, reversed in part, and remanded.

The court of appeals engaged in the two-part analysis for qualified immunity mandated at the time in *Saucier v. Katz*, 533 U.S. 194 (2001): "The first question is whether the facts, when taken in the light most favorable to Plaintiffs, show that Defendants' conduct violated a constitutional right. [*Saucier*, 533 U.S.] at 201. The second question is whether the constitutional right at issue is 'clearly established.' *Id.* at 202." Pet. App. 21a.

Citing *Hunter v. Bryant*, the court of appeals acknowledged that qualified immunity is a question of law, not a question of fact, but observed that Petitioners would be entitled to qualified immunity as a matter of law in the context of a Rule 50 motion only

> if, taking the facts in the light most favorable to Torres, [Petitioners] violated no clearly established constitutional right. The court must

> deny the motion for judgment as a matter of law if reasonable jurors could believe that Defendants violated Torres' constitutional right, and the right at issue was clearly established.

Pet. App. 21a. Because of the Rule 50(a) context and its required viewing of the facts in Respondents' favor, the court of appeals reversed in part because material, disputed facts were in evidence from which a reasonable jury could have found that probable cause to arrest was lacking:

> Disputes of fact exist as to whether Diana positively identified Torres, whether school police officer Steinberg told Officer Lamar and/or Detective Hickman that Torres had "recently been jumped into the CPA gang," and whether it was reasonable for the detectives to believe that in the group photo Torres was making a gang sign despite the fact that only one of Torres' fingers is visible in the photo. These disputes of fact are material because they go to what the detectives knew at the time they arrested Torres and, accordingly, to whether they had probable cause, and reasonably believed they had probable cause, to do so. Taking these facts in the light most favorable to Torres, a reasonable officer would have known that he lacked probable cause for the arrest.

Pet. App. 23a-24a.

This conclusion, that a reasonable jury could have found that Petitioners arrested Torres without probable cause, led directly to the court of appeals' conclusion on the second *Saucier* inquiry; e.g., whether

the constitutional right was clearly established. Citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964), the court noted that "[c]ourts have long held that the Fourth Amendment requires probable cause before an officer may arrest an individual." Pet. App. 24a. Then, the court adverted to this Court's decision in *Saucier* for the touchstone that "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Pet. App. 24a.

The court of appeals concluded that a reasonable jury could find, in view of the disputed facts in evidence, that reasonable officers would not have concluded that they had probable cause to arrest as Petitioners Roberts and Park did. Rather,

> [i]n light of the arguably suggestive six-pack, [the eyewitness's] merely comparative identification six weeks after the shooting, the lack of direct evidence that Torres was a member of a gang (let alone the CPA gang), the lack of physical evidence tying Torres to the shooting, the fact that Torres did not attempt to flee when the detectives approached him, and the lack of evidence that the third male passenger acted in concert with Castaneda with conscious disregard for human life, a material issue of fact existed as to whether a reasonable officer would have relied on [the information in the detectives' possession] *without further verification*.

Pet. App. 24a-25a (internal quotation marks and citation omitted) (emphasis added).

REASONS FOR DENYING THE PETITION

1. Rule 50(a) Precludes a Court from Deciding Qualified Immunity As a Matter of Law at the Close of Evidence without Regard for Disputed Facts.

The purpose of Rule 50(a) does not comport with holding, as a matter of law, that questions surrounding qualified immunity are never for a jury regardless of what stage litigation is in. *See, e.g., Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 399 (2006)(Rule 50 allows a party to challenge the sufficiency of the evidence before the case is submitted to the jury). Rule 50(a) states:

> Judgment as a Matter of Law. (1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Whenever the issue is qualified immunity, the Petitioners ask this Court to ignore Rule 50(a)(1)'s mandate that a district court examine whether "a reasonable jury would . . . have a legally sufficient evidentiary basis to find for a party on that issue."

This Court has held that the role of the jury with respect to Rule 50(a) cannot be so denigrated, because

to do so would place the court in the role of factfinder when the parties dispute what the facts are. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are *jury* functions, not those of a judge, whether he is ruling on a motion for summary judgment *or for a directed verdict*." *Anderson v. Liberty Lobby,* 477 U.S. 242, 255 (1986)(emphasis added). "The evidence of the non-movant is to be believed by the judge in deciding a Rule 50(a) motion, and all justifiable inferences are to be drawn in his favor." *Id.* (*citing Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970)).

This Court has explained what courts of appeal may and may not do pursuant to Rule 50(a): "'the court of appeals could set aside the verdict for error of law, such as the trial court's *ruling* respecting the sufficiency of the evidence, . . . but could not itself determine the issues of fact and direct a judgment for defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury[.]'" *Unitherm,* 546 U.S. at 402 n.4 (2006)(*quoting Baltimore & Carolina Line, Inc. v. Redman,* 295 U.S. 654, 658 (1935)). Likewise, to do as Petitioners suggest – have a *trial court* decide disputed issues of fact on a Rule 50(a) motion and direct a judgment as happened here – countermands not only *Unitherm* but also the Seventh Amendment right to a jury trial. "Indeed, Rule 50 was drafted with such concerns [as the constitutional right to a trial by jury] in mind." *Id.* (*citing* 9A C. Wright & A. Miller, Federal Practice and Procedure § 2522, pp. 244-246 (2d ed. 1995)).

Clearly, according to both Rule 50(a) and this Court's precedent, the role of the judge when presented with a Rule 50(a) motion is *only* to determine whether *a reasonable jury* could find for the non-movant. Where there is sufficient evidence, it is *not* the judge's role to decide, as a matter of law, the issue of qualified immunity and thus preclude the jury's resolution of any disputed facts surrounding it.

While *Saucier's* two-step protocol to decide whether there is qualified immunity is a judge-made rule subject to change by this Court, the Federal Rules of Civil Procedure are not. *See Pearson v. Callahan,* ___ U.S. ___, 129 S.Ct. 808, 817 (2009)(distinguishing judge-made rules from "'a general presumption that legislative changes [to statutes] should be left to Congress'")(*quoting State Oil Co. v. Khan,* 522 U.S. 3, 20 (1997)). As Justice Stevens has observed, "we have an overriding duty to obey statutory commands that unambiguously express the intent of Congress even in areas such as *procedure* in which we may have special expertise." *Unitherm,* 546 U.S. at 407 (Stevens, J., dissenting) (emphasis added). And, regarding statutory commands, "Rule 50(a)(1) . . . states that in ruling on a motion for judgment as a matter of law, the court is to inquire whether there is any 'legally sufficient evidentiary basis for a reasonable jury to find [for the opponent of the motion.]'" *Weisgram v. Marley Co.,* 528 U.S. 440, 453-54 (2000)(*quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 242 (1993)).

Therefore, contrary to what the Petitioners assert, there is no room under Rule 50(a) – a clear expression of Congressional intent – for any "trumping" by the idea that only courts may determine qualified

immunity as a matter of law, without regard for disputes of fact that are in evidence. *See* Pet. 16 ("the reasonable jury standard [of Rule 50(a)] does not trump the straightforward 'clearly established' inquiry."). Instead, the law is that a "'motion for judgment cannot be granted unless, as a matter of law, the opponent of the movant failed to make a case.'" *Weisgram,* 528 U.S. at 452 n.9 (*quoting Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251 (1940)). The movant must specify for the trial court exactly how the opponent failed to make a case: "[s]uch a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to judgment." Rule 50(a)(2). This is necessary so the losing party "will have had notice, before the close of evidence, of the alleged evidentiary deficiency." *Id.* at 454 (citing Rule 50(a)(2)). The Petitioners did not do this; they made no such argument as they make now. Instead, they argued only how their one-sided *inferences* from the disputed facts supported probable cause. With respect to qualified immunity, they stated only: "Now, my fallback position is qualified immunity, but that only goes to the federal cause of action. However, if you – well, that's my argument." [Respondents'] Further Excerpts of Record 3, lines 11-13. What is more, contrary to their assertion for the first time before this Court that qualified immunity is a matter of law for the court even in a Rule 50(a) motion where there are disputes of material fact, Docket Entry # 68 in the Central District of California demonstrates that Petitioners *filed* a "PROPOSED QUALIFIED IMMUNITY JURY INSTRUCTION." [Respondents'] Excerpts of Record ("ER") 294. The case law prohibits such an instruction. *See Rodriguez-Marin v. Rivera-Gonzalez,* 438 F.3d 72, 83 (1st Cir. 2006)(because qualified immunity is a legal question for the court to

decide, there is no jury instruction regarding it). Not only does this illustrate the way the Petitioners have changed horses in the middle of the stream in the course of this litigation, but it also demonstrates they do not have a firm grip on the law regarding qualified immunity.

The Petitioners do not contend at this late stage that there were no disputed issues of fact about probable cause to arrest. Rather, they contend that those disputed facts concerning probable cause *are not material* to qualified immunity, Pet. 14-15, and therefore, this Court should hold that qualified immunity should be decided solely by the district court as if Rule 50(a), with its mandate to examine the sufficiency of the evidence, does not exist and as if qualified immunity at this stage of trial were not a defense.

2. The Petitioners Waived Their Right to Assert Qualified Immunity As an Immunity from Suit.

Not only do Petitioners ignore Rule 50(a)'s clear mandate and this Court's explication of it, but they also ignore the very significant fact that they waived their right to qualified immunity as an immunity from suit, even as they as claim that same immunity now. "'No procedural principle is more familiar to this Court than that . . . a right may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having the jurisdiction to determine it.'" *Unitherm*, 546 U.S. at 404-05 (*quoting Yakus v. United States*, 321 U.S. 414, 444 (1944)). Qualified immunity, as a defense, does not have the same force as qualified immunity as an immunity from suit, because its

context is an ongoing trial by jury. That is why these Petitioners should not have their day in this Court, and especially not to directly challenge the purpose and application of Federal Rule of Civil Procedure 50(a) as if there were no jury.

This Court has admonished litigants yet again in its latest decision regarding qualified immunity: "'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Pearson*, 129 S.Ct. at 815 (*quoting Hunter v. Bryant*, 502 U.S. 224, 227 (1991)(per curiam)(listing cases)). Despite this strong admonition, Petitioners did not raise qualified immunity at the "earliest possible stage in litigation," either in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or in a motion for summary judgment under Federal Rule of Civil Procedure 56(b). Instead, in Petitioners' only motion for summary judgment – asserting that Respondents could not prove liability against the City of Los Angeles and the Los Angeles Police Department under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) – Petitioners acknowledged that "*[b]ecause triable issues of material fact exist regarding probable cause for [Respondent Torres's] arrest*, [Petitioners] move for partial summary judgment on *Monell* liability only." Pet. App. 10a (emphasis added). In short, Petitioners affirmatively waived their right to assert immunity from suit and qualified immunity became a defense. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is . . . permitted to go to trial."). In view of the clearly disputed facts, this was a wise decision on the part of Petitioners' trial counsel. It

was completely in accord with the law and the facts. Petitioners should not second-guess this decision before this Court.

Therefore, by Petitioners' own election, the issue of qualified immunity became "a mere defense." *Id.; accord, Sloman v. Tadlock,* 21 F.3d 1462, 1468 & n.6 (9th Cir. 1994)("The advantage of timing is already lost." "[S]ince the suit has already proceeded to its conclusion . . . it is now effectively a defense."). What is more, the Petitioners not only failed to raise qualified immunity early on in the pleading stage, but they also failed to seek an order narrowly tailoring discovery to the issue of qualified immunity, *see Anderson v. Creighton*, 483 U.S. 635, 646-647, n.6 (1987), and never moved for summary judgment on the issue. The Petitioners understood and freely admitted why there could be no immunity from suit: "[b]ecause triable issues of material fact exist[ed] regarding probable cause for [Respondent Torres's] arrest . . . ." Pet. App. 10a. Thus, Petitioners established the entire procedural context. It is too late to change that now, and it is too late to argue that the clearly disputed facts are somehow not material to whether there was probable cause. Pet. 14-15.

3. *Hunter v. Bryant*'s Undisputed Facts Establishing Probable Cause At Summary Judgment Cannot Trump the Reasonable Jury Standard in Rule 50(a), Because Disputes Involving the Historical Facts Leading Up to An Arrest Are for the Jury.

Petitioners claim this Court rejected any "reasonable jury" standard for qualified immunity in *Hunter v. Bryant*, 502 U.S. 224 (1991)(per curiam).

Pet. 12-16. They argue that even though they waited until a Rule 50(a) motion to bring up qualified immunity, "the court's task is *different* where qualified immunity is at stake" and "[r]eview is needed to clarify that even where qualified immunity is asserted in a Rule 50 motion for judgment as a matter of law, rather than a motion for summary judgment, *Hunter* controls and the reasonable jury standard [of Rule 50(a)] does not trump the straightforward "clearly established" inquiry. Pet. 16 (emphasis added).

Hunter is distinguishable. There, the facts were undisputed to establish probable cause and qualified immunity. *See* 502 U.S. at 228 (listing the undisputed facts). Here, by Petitioners' own admission, they were not. *Hunter* involved a summary judgment, precisely the vehicle prescribed by this Court to decide whether the officers were entitled to qualified immunity as an immunity from suit. In contrast, here the jury heard all the evidence, including the disputed facts material to whether there was probable cause to arrest Raymond Torres.

Disputed issues of fact surrounding probable cause are routinely decided by the jury when a case goes to trial. That is because "[a]rticulating precisely what . . . 'probable cause' mean[s] is not possible. [Probable cause is a] commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003)(quotations and citations omitted). Such considerations of everyday life upon which reasonably prudent people act certainly may be made by police in deciding whether there is probable cause, but when

the arrest's historical facts are disputed – such as whether a witness positively identified a suspect; whether a "gang sign" is being flashed when only one finger is visible; whether the photographic lineup was unduly suggestive; and whether standing in a school photo with gang members indicates guilt by association in a murder a year later – those disputed facts are uniquely for a jury, especially in a Rule 50(a) motion. *Cf. id.* at 371 (Court describes undisputed historical facts to hold there was probable cause). If the police may take into account considerations of everyday life to ensure their actions are reasonable and prudent in an arrest, so may a jury when the facts are disputed as to whether there was probable cause for that arrest.

This Court long ago recognized the critical difference between undisputed facts and a "belief of a fact"when determining whether there is probable cause. "[W]hen there is no dispute of fact, the question of probable cause is a question of law, for the determination of the court." *Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co.*, 120 U.S. 141, 148 (1887). But "when the question of the defendants' belief of the facts relied upon to prove want of probable cause [is involved] . . . [w]hat their belief was is always a question for the jury." *Stewart v. Sonneborn*, 98 U.S. 187, 194 (1878). Even when the parties dispute the facts early on in litigation, discovery is necessary before a motion for summary judgment on qualified immunity grounds can be resolved. *See Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). And when, as here, the evidence clearly demonstrates a radical difference between how the police describe the historical facts and how witnesses

at trial describe those same facts, the issue is for the jury.

Unlike the reasons to change *Saucier's* judge-made protocol for qualified immunity this Court gave in *Pearson*, Petitioners do not suggest that the requirement that defendants bring qualified immunity to the table at the earliest possible stage of litigation is "unworkable or [is] badly reasoned." Likewise, there is no suggestion that this Court's pronouncements about how to apply Rule 50(a) are "unworkable or are badly reasoned." *Payne v. Tennessee,* 501 U.S. 808, 827 (1991)("when governing decisions are unworkable or are badly reasoned," the Court is not constrained to follow precedent). Even if there were a whiff of doubt about the efficacy or purpose of qualified immunity in a Rule 50(a) setting – which there is not – "[a]dhering to [such] precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'" *Id.* at 827 (*quoting Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406 (1932)).

None of the reasons this Court provided for changing its mind in *Pearson* about qualified immunity protocol is present in this case. There is no reason whatsoever that this Court should grant certiorari under these circumstances, where Petitioners wisely forfeited a potential immunity from suit in the face of disputed facts; failed to pursue narrowly tailored discovery; the parties had settled expectations under the Seventh Amendment about the role of the jury should the evidence be sufficient and conflicting; where reliance on the proper application of Rule 50(a) is paramount given the words of that statute and Congressional intent; and finally, where

nothing suggests that the judge-made rule that qualified immunity be brought at the earliest possible stages of litigation is unworkable or badly reasoned such that the "clearly established" inquiry should trump it to make an immunity from jury review out of what became a defense.

4. There Is No Conflict Among the Circuits.

Petitioners claim that the circuits are deciding these cases differently and that this Court should resolve the conflict. This Court need not do so, because all of the cases Petitioners cite are either not in conflict with the Ninth Circuit or are not on point.

For example, Petitioners cite *Rodriguez-Marin v. Rivera-Gonzales*, 438 F.3d 72 (1st Cir. 2006), for the proposition that qualified immunity is never a question for the jury. This statement does not accurately reflect what the First Circuit says, which is:

> [Whether a reasonable officer would understand that the challenged conduct violated an established right] is also a question of law, *but factual questions, to the extent they are antecedent to this determination, must be determined by a jury.* While preliminary factual questions regarding qualified immunity are sent to the jury, the legal question of the availability of qualified immunity is ultimately committed to the court's judgment.
>
> . . . Defendants . . . are not entitled to a jury instruction regarding qualified immunity, since it is a legal question for the court to decide. *Defendants are entitled to have a jury determine any preliminary factual questions*[.]

438 F.3d at 83 (emphasis added). Thus the First Circuit agrees with the Ninth Circuit, that where preliminary factual disputes exist, "[Petitioners] Roberts and Park were not entitled to qualified immunity as a matter of law." Pet. App. 25a.

Petitioners say the Fourth Circuit holds that the legal question of qualified immunity is for the court "under a particular set of facts." *Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir. 2005). This level of generality is not helpful when the facts in *Willingham*, like *Torres*, were highly disputed as to whether there was probable cause. In *Willingham*, the Fourth Circuit agrees with this Court, the Ninth Circuit, and the First Circuit:

> There is no question that when the historical facts are undisputed, whether a reasonable officer should have known of the illegality of his conduct is a question of law for the court. The existence of *disputed* material facts – *which must be submitted to a jury* – does not alter the essentially legal nature of the question of whether the right at issue was clearly established.

Id. at 559 (internal citations and quotations omitted)(emphasis added). The First Circuit continues:

> [J]uries are ill-suited to make the determinations of law required by the qualified immunity analysis. Therefore, to the extent that a dispute of material fact precludes a conclusive ruling on qualified immunity at the summary judgment stage, the district court

> should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury.

Id. at 560. Again, Petitioners freely admitted here that there were disputes of material fact precluding a conclusive ruling on qualified immunity at the summary judgment stage. These disputed facts were in evidence and should have been submitted to the jury.

Petitioners' third case, *Riccardo v. Rausch*, 375 F.3d 521 (7th Cir. 2004), has no application here. A jury awarded Riccardo damages of $1.5 million because Rausch, a prison guard, had placed Riccardo in the same jail cell as Juan Garcia, who sexually assaulted Riccardo. Petitioners quote the Seventh Circuit out of context. At the end of the same paragraph from which Petitioner's quote is excerpted, *see* Pet. 20, the court states:

> *We need not pursue the immunity defense*, however, because *Saucier* calls on appellate courts to address the merits first, and Rausch is entitled to prevail outright: no reasonable jury could have concluded, on this record, that Rausch actually recognized that placing Garcia and Riccardo together exposed Riccardo to substantial risk.

375 F.3d at 526 (citations omitted). Because the Seventh Circuit did not place its holding on an analysis of qualified immunity at all, the case is entirely inapposite.

Finally, in *Johnson v. Breeden*, 280 F.3d 1308 (11th Cir. 2002), Petitioners quote the Eleventh Circuit for a statement that is not in conflict with the Ninth Circuit, other circuits, or this Court. Pet. 20. This is clear from what the Eleventh Circuit actually says:

> But if the evidence at the summary judgment stage, viewed in the light most favorable to the plaintiff, shows there are facts that are inconsistent with qualified immunity being granted, the case and the qualified immunity issue along with it will proceed to trial.
>
> Defendants who are not successful with their qualified immunity defense before trial can re-assert it at the end of the plaintiff's case in a Rule 50(a) motion. That type of motion will sometimes be denied because the same evidence that led to the denial of the summary judgment motion usually will be included in the evidence presented during the plaintiff's case, although sometimes evidence that is considered at the summary judgment stage may turn out not to be admissible at trial. *Where there is no change in the evidence, the same evidentiary dispute that got the plaintiff past a summary judgment motion asserting the qualified immunity defense will usually get that plaintiff past a Rule 50(a) motion asserting the defense*, although the district court is free to change its mind.
>
> It is important to recognize, however, that a *defendant* is entitled to have any evidentiary disputes upon which the qualified immunity defense turns decided by the jury so that the court can apply the jury's factual

> determinations to the law and enter a post-trial decision on the defense. *When the case goes to trial, the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense, but the jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty.*

280 F.3d at 1317-18 (citations omitted)(emphasis added). The Ninth Circuit agrees that the disputed issues of historical fact were for the jury when it said: "in this case historical facts material to the qualified immunity determination are in dispute." Pet. App. 23a. Once more, the Petitioners admitted as much in their motion for summary judgment on the *Monell* claim.

Thus, the purported conflict among the circuits does not exist. The point that Petitioners side-step is that if the Rule 50(a) motion is denied, the case goes to the jury. Or, as in this case, if the district court errs in its Rule 50(a) determination, and is reversed by a court of appeals, then the case goes to the jury. It is simply not the case, as Petitioners would have it, that the qualified immunity defense is *never* for a jury. That is only so if the facts supporting probable cause are undisputed. If Petitioners now believe that the historical disputed facts are not material, Pet. 14-15, it is only because they are weighing those facts in their own favor. That is not their role; it is the jury's.

5. Petitioners Have Distorted the Facts.

In an effort to persuade this Court, Petitioners have transmogrified the facts as follows:

• Petitioners assert that "Torres *matched the description* Diana provided." Pet. 22 (emphasis added). Not so. The record shows that Torres only partially matched the very *general* description Diana had provided, and that "Detective Roberts acknowledged at trial that *Diana's description was too generic to go anywhere with it.*" Pet. App. 5a (emphasis added).

Also, Diana's description "did not match Torres insofar as Diana described the third male passenger as having some hair," Pet. App. 17a, because Torres had shaved his head. Pet. App. 6a. And her description did not match what the school officials told Petitioners; namely, that Torres "always wears [a] grey metal cross on a chain around his neck," Pet. App. 7a, while Diana did not mention a chain or cross around the passenger's neck. Pet. App. 7a, 17a.

• Petitioners assert that "[they] knew prior to the commission of the crime, Torres spent several hours with the driver *and the shooter*, who were both known gang members." Pet. 23 (emphasis added).

The facts are otherwise. Petitioners did know that Torres and the driver, Santillan, went to the same high school and "hung out" at lunchtime (and not at any other time or place). Pet. App. 6a-7a. But there is no evidence that Castaneda, the shooter, attended that same school or that Torres had ever met or spoken with him. And there is no evidence that Torres had spent several hours with Castaneda prior to the commission of the crime. The only evidence that Torres and Santillan were together was the group photo, taken by a teacher at a school event called "Melody of Words" that a high school official had given

to the LAPD "*a year earlier* when it was investigating Santillan in connection with another shooting . . . ." Pet. App. 6a (emphasis added).

• Petitioners claim that "while Diana may not have positively identified him, she picked Torres' photograph from the six-pack photographic array as the person who looked '*most like*' the third suspect." Pet. 23. This is a disingenuous "spin" of what the record reflects Diana actually said. Diana never said "*most* like;" she said Torres looked "*more likely* [sic] *to* the other guy in the car." Pet. App. 9a (emphasis added). And the Petition masks the mendacity with which the officers acted just after arresting Torres. Those officers wrote a flat, unequivocal statement: "[She] identified Torres as the fourth person in the car with them [when] the incident occurred." ER 238 (Arrest Report).

Moreover, Petitioners have failed to describe the other facts accompanying the manner in which they presented the six-pack to Diana. The Ninth Circuit recounts the evidence at trial:

> Detectives Roberts and Park went inside to show Diana the six-pack; Detective Roberts waited outside in his car. Detective Roberts told Diana that he 'had possibly identified the 15- to 16-year old chubby boy' and then read her a standard 'photographic show-up admonition.'
>
> After Detective Roberts handed Diana the six-pack, Diana stared at it – according to Diana for between *five and ten minutes* – whereupon Detective Roberts [changed the question and] asked her *at whom she was staring*. Diana then

> indicated that she was staring at photo #6, the photo of Torres. However, there was conflicting testimony as to whether Diana also stated that the person in photo #6 was the third male passenger in the car, or, on the contrary, whether she stated that she did not know whether it was him or not. It is undisputed, however, that the detectives then asked Diana to write down what she thought, whereupon Diana wrote on the six-pack, 'I circle the person in #6 because he looks *more likely* [sic] *to* the other guy in the car.' Detective Roberts acknowledged at trial that, based solely on what Diana wrote on the six-pack, he did *not* have probable cause to arrest Torres.

Pet. App. 8a-9a (emphasis added).

• Petitioners assert that "[they] knew that Torres had gone into rival gang territory with known gang members and challenged rival gang members by flashing gang hand signs and shouting challenges." Pet. 23.

However, Petitioners provide no citation to the record for this statement because there is none. The only record evidence is that Torres was copying the gangster "look;" was "hanging out" at lunch with Santillan at his high school; and appeared in a group photo taken by a teacher at a school event called "Melody of Words" [a book fair] a year earlier that included Santillan and two otherwise uninvolved individuals who were CPA gang members. Pet. App. 6a. More importantly, "Detectives Roberts and Park both testified that, at the time of Torres' arrest, *they were unaware one way or the other whether Torres was*

a member of the CPA gang." Pet. App. 7a (emphasis added).

Furthermore, because of conflicting testimony, the Ninth Circuit noted that Defendants had conceded that the court must "assume the following: that school police officer Steinberg did *not* tell Officer Lamar or Detective Hickman that Torres had 'recently been jumped into the CPA gang'. . . ." Pet. App. 16a (emphasis added).

• Petitioners have failed to mention two significant facts that the court of appeals took into account: First, "Detective Hickman searched Torres' name in *six different databases*: an adult criminal records database, a juvenile records database, a Department of Motor Vehicles records database, the California Criminal History Record System, *the Cal-Gangs database*, and the *gang card file at the West Valley police station*. Detective Hickman *found no matches for Torres*." Pet. App. 7a (emphasis added). And second: "Detective Park acknowledged at trial that at the time of Torres' arrest there was *no physical evidence* linking Torres to the shooting." Pet. App. 9a (emphasis added).

• Petitioners claim that "[t]hey knew that Torres was in the back seat with the shooter just before the murder, at the time of the murder, and after the murder." Pet. 23. Petitioners cannot point to any place in the record for these assertions. The detectives were not present to witness the car chase and murder. For Petitioners to know that Torres was in the back seat with the shooter *at any time*, Diana would have had to positively identify Torres as being in the car that day. She did not. In fact, she testified that she had been

saying the same thing since she was first interviewed on August 25, 2004: "Which was that I didn't know who . . . was the guy. I don't remember the face of the guy because that was the first time I seen him in my whole entire life. It was just for a couple hours I seen the guy." ER: 181:10-18. She elaborated: "I don't remember him that good because it was the first time, and I didn't tell them it's probably him or not." ER 182:10-12.

Furthermore, Diana testified that she was not changing her story with respect to the "other guy," just as she was not backing off from her positive identifications of her boyfriend (the driver) and the shooter:

> I told everybody the same thing. I haven't changed my story, it's him or it's not him.
>
> . . . . If I was trying to accuse him and then try to back up, I would have done it with the shooter too and the driver too, because the shooter is from Canoga and the driver talks to Canogas. So I would have done the same thing because, I mean, with the shooter I said it's him, and it's him. I wrote it down, it's him, and I didn't back off. If it would have been him, I would have told you it's him. If it wasn't him, I would have told you, I'm not sure, I don't remember if it's him or not.

ER 185:3-14.

Yet Rains wrote unequivocally in the Arrest Report that, "[Diana] identified Torres as the fourth person in the car with them [when] the incident occurred." ER

238. When Diana was shown *that* statement in the Arrest Report, Diana testified that this statement was *false*. ER 186:20-23 ("So, is the statement [Diana] identified Torres as the fourth person in the car with them, I'm inserting a word, when the incident occurred, is that statement false? A. Yes."). She testified that she did *not* "positively identify No. 6 as being the person in the back seat of the car." ER 218:20 to 219:2 (Q: "That statement says you positively identified No. 6 as being the person in the back seat of the car. Did you do that? " A: "No.").

Even if the dispute over whether the six-pack was suggestive and whether Detective Roberts had infected the identification process by telling Diana that the detectives had "possibly identified the 15 to 16 year-old chubby boy," Pet. App. 18a, are *ignored*, Diana made no positive identification. There is no positive identification because after "[Diana] stared at [the six-pack] in silence for between *five and ten minutes* and then, upon being asked *at whom she was staring* [which is not the same as being asked who was in the car "before the murder, at the time of the murder, and after the murder"], she made only a *comparative* identification. She stated that Torres looked *more like* the third male passenger than the other persons depicted in the six-pack (only one of whom was visibly overweight), "but that she was not sure whether or not it actually was him." Pet. App. 19a.

Moreover, there is indicia only of a *lack* of reliability: "While Diana [only] spent *several hours* in the car with the third male passenger, *she had never seen him before and did not pay attention to him*. In addition, . . . Diana gave only a general description of the third male passenger, which did not match Torres

in two important respects (head of hair and no mention of prominent cross). Further, Diana was not shown the six-pack until *six weeks after the shooting*." Pet. App. 19a (emphasis added).

On the facts the Petitioners claim to have known, *see* Pet. 23, Petitioners offer their conclusion that there existed "*more* than a 'fair probability' for [them] to conclude that Torres was the third suspect in the vehicle and that he aided and abetted in the murder and attempted murder." Pet. 22 (emphasis added). But the claimed facts are *not* borne out by the record. On the record facts or inferences to which Torres was entitled, Petitioners are *not* entitled to qualified immunity as a matter of law. A jury is needed to resolve the factual disputes to assist the district court, and to serve one of the two interests that this Court has recognized: "the need to hold public officials accountable when they exercise power irresponsibly." *Pearson*, 129 S.Ct. at 815.

Did Petitioners have a reasonable alternative? Yes. The skimpy facts known to Petitioners cried out for more investigation, or at least a conversation with Torres before he was arrested, which did not occur. *See* Pet. App. 9a. The issue is whether Petitioners acted reasonably and with prudence here when they concluded they had probable cause. If they must apply the "factual and practical considerations of everyday life," *Maryland v. Pringle,* 540 U.S. at 370, they must for starters tell the truth and not jump to unwarranted conclusions.

Wanting to avoid a jury verdict altogether, Petitioners not only distort the facts (as above), they assert that the issue of qualified immunity is "never a

jury question." Pet. 19. They claim that in this case, the Ninth Circuit confused "*undisputed* historical facts" with "the inferences properly drawn from [those facts]." Pet. 19 n.4 (emphasis added). Oddly, Petitioners also assert that in *Torres,* the Ninth Circuit "confused *disputed* facts with the disputed inferences that could be drawn from those facts." Pet. 20 (emphasis added). Whatever Petitioners may mean, they are the ones who are confused. One example suffices: in the photograph of Raymond Torres at the school book fair, taken from some distance, only one of his fingers is visible. That is a fact. The inference drawn, or the *belief* the officers had about this fact, was that this one finger was flashing a gang sign. The inference drawn, or the *belief* the Respondents had, was that no one looking at this photograph could seriously believe that a gang sign was being flashed from just this one visible finger. Long ago – 131 years ago to be precise – this Court decided this particular problem elegantly: "when the question of the defendants' belief of the facts relied upon to prove want of probable cause [is involved] . . . [w]hat their belief was is always a question for the jury." *Stewart v. Sonneborn,* 98 U.S. 187, 194 (1878). No amount of epistemological posturing that a "belief" is some sort of proper "inference" can change this law. Beliefs about facts are the same as inferences from facts, and they can differ from person to person. In any event, "the drawing of legitimate *inferences* from the facts are *jury* functions, not those of a judge, whether he is ruling on a motion for summary judgment *or for a directed verdict.*" *Anderson v. Liberty Lobby,* 477 U.S. at 255 (emphasis added). "The evidence of the non-movant is to be believed by the judge in deciding a Rule 50(a) motion, and all

justifiable inferences are to be drawn in his favor." *Id.* (emphasis added).

6. There Is No Reason Why this Case Should Not Be Remanded for Trial.

On remand, were a jury to decide that Petitioners had violated Torres's clearly established right not to be arrested without a warrant and in the absence of probable cause, and that no reasonable police officer would have arrested him under the circumstances the jury finds were known to the Petitioners at the time, those decisions would be justified: "[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law, . . . and insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz v. Economou*, 438 U.S. 478, 506-507 (1978).

On remand, Petitioners must make their Rule 50(a) motion before the jury reaches a verdict, and can renew their motion for judgment as a matter of law after the verdict by invoking Rule 50(b). Once the jury resolves the disputed factual issues, it will establish "a particular set of facts." *Willingham*, 412 F.3d at 560. The district court can then decide the issue of qualified immunity as a matter of law under Rule 50(b), and that decision will be reviewable.

For these reasons, there is no occasion for this Court to decide that the doctrine of qualified immunity is a *sub silentio* amendment to Rule 50.

CONCLUSION

This case presents no occasion for this Court to further sculpt the doctrine of qualified immunity or to hold that the doctrine is an exception to or somehow modifies Rule 50(a) of the Federal Rules of Civil Procedure.

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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